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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

MAY 29 TO SEPTEMBER 30, 1913

JAMES M. REASONER
STATE REPORTER

VOL. 176

FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1914

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SUPREME COURT.

CHIEF JUSTICE.

	TERM EXPIRES
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FRANZ C. KUHN, Mt. Clemens, . .	Dec. 31, 1917
JOHN W. STONE, Marquette, ...	Dec. 31, 1917
RUSSELL C. OSTRANDER, Lansing, . .	Dec. 31, 1919
JOHN E. BIRD, Adrian, ...	Dec. 31, 1919

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Attorney General—GRANT FELLOWS, Hudson.

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4.	JAMES A. PARKINSON,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	GEORGE W. SMITH,	PONTIAC.
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9.	FRANK E. KNAPPEN,[1] NATHANIEL H. STEWART,[2]	KALAMAZOO.
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15.	FREDERICK W. KNOWLEN,	CONSTANTINE.
16.	JAMES G. TUCKER,	MT. CLEMENS.
17.	WILLIS B. PERKINS, JOHN S. McDONALD, WILLIAM B. BROWN,	GRAND RAPIDS.
18.	CHESTER L. COLLINS,	BAY CITY.
19.	CHARLES A. WITHEY,	REED CITY.
20.	ORIEN S. CROSS,	ALLEGAN.
21.	PETER F. DODDS,	MT. PLEASANT.
22.	EDWARD D. KINNE,	ANN ARBOR.
23.	MAIN J. CONNINE,	OSCODA.
24.	WATSON BEACH,	LEXINGTON.
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26.	FRANK EMERICK,	ALPENA.

[1] Died July 17, 1918. [2] Appointed August 7, 1918, to fill vacancy.

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38.	CHARLES A. GOLDEN,	MONROE.
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SUPERIOR COURT OF GRAND RAPIDS, WILLIAM J. STUART.

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APRIL TERM, 1913.*

JAPES *v.* HARMON.

1. CONTRACTS—BUILDING CONTRACTS—ACCEPTANCE OF WORK.
   The owner of a building in process of construction, who is compelled by the expiration of a lease held by him to occupy the premises before the work has been completed as required by his contract with the builder, does not thereby accept the building.

2. SAME—ARCHITECT'S CERTIFICATE—PAYMENT—ACCORD.
   Where defendant, in an action to recover a claimed balance due on a building contract, produced testimony to show that certain work and materials furnished were defective and the contractor had received his final certificate from the architect as payment in full, the amount remaining to be held by the owner to cover the cost of replacing the work objected to, it was not error to admit evidence of the contractor's agreement to accept such certificate in full satisfaction, and the court correctly instructed the jury that, in the absence of a denial by such contractor as to the alleged settlement, he could not recover.

Error to Wayne; Mandell, J. Submitted January 30, 1913. (Docket No. 89.) Decided May 29, 1913.

Assumpsit by Henry Japes against Claude M. Harmon for a balance due under a building contract. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Henry C. L. Forler, for appellant.

Chamberlain, May, Denby & Webster, for appellee.

* Continued from Vol. 175.

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MCALVAY, J. This is an action in assumpsit brought by plaintiff, as assignee, against the defendant in justice's court, and later appealed to the circuit court, where a verdict of no cause of action was directed. From a judgment entered upon such verdict, the case is removed to this court for review upon a writ of error.

Dettloff Bros. were contractors and builders in the city of Detroit and entered into a written contract with defendant to perform only the carpenter work, including the furnishing of all necessary material for a house being built by him. This suit is brought by plaintiff as assignee to recover a balance claimed to be due and unpaid upon Dettloff Bros.' contract. The contract price was $2,561, which, with certain extras allowed at $76.35, amounted to $2,637.35. The total of this amount, excepting $163, has been paid.

Mr. Stevens was the architect and superintendent of the building. This was the uniform building contract adopted by the American Institute of Architects, and in the contract and specifications provision was made that payments to the contractor should be made only upon the certificate of the architect and superintendent. No disagreement arose between the parties to this contract, except on account of certain cornice work, sash, and doors, which were furnished to the contractors by this plaintiff, who was engaged in that business. The matter of the cornice work was adjusted. Mr. Stevens, the superintendent, decided that the doors and sash were not according to specifications on account of certain defects. This objection was called to the attention of plaintiff by Dettloff Bros., and some steps were taken looking toward an adjustment between them by arbitration. This, however, was not consummated.

On April 17, 1907, Herman Dettloff, one of the contractors, representing his firm, went to the superin-

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tendent for a final certificate. The matter of the imperfect doors was discussed between them, and a certificate for $174.35 was issued to Mr. Dettloff, presented to defendant, and paid by him. Mr. Dettloff had a conversation with defendant at the time it was paid. Soon afterwards Dettloff Bros. made an assignment of the balance now claimed by plaintiff to be due and unpaid on Dettloff Bros.' contract.

At the close of the case counsel for defendant moved for a directed verdict on the ground that under the contract payments were to be made by defendant only on the certificate of the superintendent, and that plaintiff, as assignee, received no such certificate, and that there was no evidence of fraud or collusion by the superintendent with the owner or bad faith on his part in withholding the certificate; that neither plaintiff nor his assignors ever requested or demanded from the superintendent a certificate covering this claim; that under the evidence in the case it appears that the difference between the contract price and the amount paid by agreement was retained to cover the cost of fixing or replacing the doors and sash; and also that the plaintiff under the contract could not recover upon a *quantum meruit*. Quite a number of errors are assigned and relied upon by appellant and discussed in his brief. The important contention made by him in the case is that the court was in error in directing a verdict against plaintiff.

It is important to state, before discussing the errors assigned, that the plaintiff is not correct in intimating that the building was accepted by defendant on March 1, 1907. It was not at that time completed for accepting. The defendant, Mr. Harmon, by force of circumstances, occupied this building before it was completed and accepted, having been forced to do so by the expiration of the lease of the premises then occupied by him.

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It seems that the whole case turns upon the agreement claimed by defendant to have been made at the time the last certificate was issued to Dettloff Bros. to the effect that it was made out and accepted by Dettloff Bros. as a final payment due to them from defendant. The testimony of Mr. Stevens, the superintendent, is positive that the $163 was held back to cover the cost of fixing or replacing the doors and sash in question. He testifies as to his conversation with Mr. Dettloff, as follows:

"He came to me after the house had been completed and said he wanted to get his money, and he came to the office, and we had quite a little talk, and I said, 'What are you doing about the doors and sash?' and he said, 'You keep out what you think that is worth, and I will keep it out of Japes, but I want to get my money out of the job.' I said that was agreeable as far as we were concerned. I had to ask my client, and these matters had been promised to be fixed up, and I was willing to withhold the money until such time as he saw fit to fix them, and that was the understanding that this certificate was given absolutely.

"*Q.* That amount of money was agreed upon between you and Mr. Dettloff to hold out?

"*A.* Yes, sir.

"*Q.* $163?

"*A.* Yes, sir."

This was objected to and a motion made to strike it out, including all of the interview between Stevens and Dettloff, on the ground that the certificate speaks for itself. This was overruled.

Mr. Harmon testifies as to what occurred when he paid this certificate as follows:

"* * * And when he brought this in I understood from him that this was the final certificate for the last payment and I brought up the question of the doors and sash, and he said, Mr. Dettloff said to me, that he had made an agreement with Mr. Stevens, the architect, to hold this $163 to cover the cost or to replace the doors and the sash, being the rejected ma-

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terial that the architect had rejected. I afterwards paid him $174.35. Mr. Dettloff said that he was going to hold out the amount of $155 which he owed Mr. Japes to cover this rejected material."

The testimony of Mr. Dettloff, who was a witness for plaintiff, shows that he was on friendly terms with Mr. Stevens, and says that he was paid this $174.35 the day he received the certificate for it. He testified as follows:

"*Q.* Do you remember going to Mr. Stevens a long time after the building had been turned over and telling him that you wanted to get this money that was paid to you on the 17th of April?

"*A.* Yes, sir; I think I must have told him I wanted to clean up there."

He testified later:

"*A.* I did understand why it was held back.

"*Q.* You agreed to that?

"*A.* I didn't really agree to it.

"*Q.* You didn't refuse it and insist upon a certificate?

"*A.* No, I had quite a little money coming, and I didn't refuse it."

The testimony above quoted of defendant Harmon and the superintendent was given before Mr. Dettloff had testified, and, although he was afterwards recalled twice as a witness, he did not deny the agreement or explain it in any way. The motion of plaintiff that the testimony of Mr. Stevens and Mr. Harmon was not admissible and should be stricken out was properly overruled by the court.

Plaintiff stands in the shoes of Dettloff Bros. as assignee of this claim. No further certificate has been requested by plaintiff or his assignors from the superintendent. It is apparent that at the time of this last payment Dettloff Bros. were desirous of cleaning up this matter, as Mr. Dettloff testified, and that this certificate was accepted by him as the superintendent and

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defendant testified. Giving to Dettloff's testimony on the part of plaintiff its strongest probative force, it was not sufficient to warrant the submission of the case to the jury. The court was not in error in directing a verdict of no cause of action against plaintiff. The remaining questions presented by plaintiff do not require consideration.

The judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, and BIRD, JJ., concurred. OSTRANDER, J., did not sit.

PUBLIC SCHOOLS OF THE CITY OF MUSKEGON *v.* WRIGHT.

1. SCHOOLS AND SCHOOL DISTRICTS—APPORTIONMENT OF PRIMARY FUND.

In apportioning to the several school districts, semi-annually, the primary school money, pursuant to statutory requirements (1 Comp. Laws, §§ 4642-4644, Act No. 36, Pub. Acts 1905), in 1908, it was the duty of the superintendent of public instruction to determine the number of children in a district from the best evidence in his power to obtain, rejecting from the census reports, if defective, the names of children which should not appear therein, and he should base his action upon a report received from the secretary of a municipal school board made up from the best obtainable sources, showing the names of children who resided in the district at that time, and the names included in the census which ought to be rejected, even though the report was received late in the year, just before the May apportionment.

2. SAME—SUPERINTENDENT OF PUBLIC INSTRUCTION—CENSUS.

It was an improper exercise of the superintendent's discretion to reject from the list of names 91 school children whose parents or guardians, as shown in the report of the

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secretary of the public schools, resided in the district, and it was unlawful to reject the names of five children who were orphans attending school in the city and living with relatives that stood *in loco parentis*.

Mandamus by the public schools of the city of Muskegon against Luther L. Wright, superintendent of public instruction, to compel respondent to change his apportionment of primary school funds for the year 1908. Submitted April 8, 1913. (Calendar No. 23,853.) Writ granted May 29, 1913.

William Carpenter (F. A. Nims, of counsel), for relator.

Grant Fellows, Attorney General, and *Thomas A. Lawler* and *F. Carew Martindale,* Assistant Attorneys General, for respondent.

MCALVAY, J. The controversy in this case arises on account of the rejection by respondent of the names of certain persons resident in the school district from the census list of the relator for the year 1908 of children of school age, made under the requirements of the statute, after such census list, duly verified, was filed in the office of respondent. It was claimed by him that an examination showed that certain persons were included who by former reports appeared to be beyond the age limit, and others were claimed to be nonresidents of the district. The matter was taken up between the parties, and after some correspondence the respondent notified the secretary of relator that he had stricken from the census list 56 names of persons 20 years of age; 49 names, no parent given; 25 names, no birthday given; and one name of a child four years of age, making a total of 131 names. Upon request of relator's secretary, respondent sent him the list of these names. Relator at once made a thorough examination and investigation relative to the information desired and made a full report, giving in detail the

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date of birth of those whose ages were questioned and the names of guardians or parents when required. This new list was taken by the secretary of relator to the office of respondent, where explanation was made to the deputy superintendent and a request made that the action of the department be corrected. This was promised by the deputy superintendent, who informed relator's secretary that it was too late to make the correction for the May apportionment of moneys, but that it would be done in time for the November apportionment. No correction was ever made. When this was discovered by relator and called to the attention of respondent, he refused to make any correction. Application was then made for the writ of mandamus in these proceedings.

The foregoing facts are taken from a stipulation entered into between the parties, which also shows that those children whose names were included in the new list at the time the census was taken were over the age of five years and under the age of 20. None of the names rejected were included in the new list where any doubt existed as to the right to be enumerated in the census. Five of these names were stricken from the list because in the judgment of respondent they had no parent or legal guardian living in the city of Muskegon. Relator admits that 39 names of children, of the 131 included in respondent's list furnished, were properly rejected; but insists in these proceedings that the balance of the names should have been accepted and included by respondent in the census of 1908. The apportionment of money mentioned is the primary school money, apportioned semi-annually by respondent, and paid out of the State treasury to each county according to the census of children of school age in such county.

The portions of the statute of this State relative to taking the annual school census, which are neces-

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sary to be considered in this case, provide as follows: 2 Comp. Laws, § 4687 (section 22), as amended by Act No. 36, Pub. Acts 1905 (4 How. Stat. [2d Ed.] § 9908).

"It shall be the duty of all school boards and boards of education in this State to make an annual school census in their respective districts or cities as is provided in this section. * * * *Second.* In all incorporated cities or special legislative district having a population of three thousand or over, within twenty days next previous to the first Monday in June of each year, the secretary of the board of education, or other reputable and capable person or persons employed by the board of education, shall take the school census of such city as follows: *(a)* The census shall be taken and reported by wards. *(b)* Each enumerator shall make a list in writing of the names and ages of all children who are five years of age and under twenty years of age, whose parents or legal guardians reside in the ward or portion of the ward allotted to said enumerator, together with the names of said parents or legal guardians, giving the street and residence number in each case, said list to be in such form as the superintendent of public instruction may prescribe, and it shall be verified by the oath or affirmation of the person making the same by affidavit appended thereto or indorsed thereon, setting forth that it is a correct list of the parents or legal guardians, their street and residence number, the names and ages of all the children between the ages aforesaid residing in the ward, or part thereof as allotted to him. * * * *Fourth.* In cities having a population of three thousand or over, the secretary of the board of education and the several enumerators shall, immediately after the first Monday in June in each year, compare, correct and compile the entire census. The said secretary of the board of education shall then attach thereto his affidavit that the several enumerators were duly employed by the board of education and that said census has been properly compared, corrected and compiled; and forthwith, and before the second Monday in July thereafter, transmit to the superintendent of public instruction the entire census, together with his affidavit and the affidavits of the

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several enumerators, and at the same time he shall transmit to said superintendent the annual statistical and financial report of said city or district. * * *"

The authority and duties of the superintendent of public instruction relative to the apportionment of the primary school money to each county according to the school census returned to him from each school district are prescribed by the following sections of the Compiled Laws of 1897 (4 How. Stat. [2d Ed.] §§ 9863-9865):

"SEC. 4642. He shall semi-annually, on receiving notice from the auditor general of the amounts thereof, and between the first and tenth days of May and November, apportion the primary school interest fund among the several townships and cities of the State, in proportion to the number of children in each between the ages of five and twenty years, as the same shall appear by the reports of the several boards of school inspectors made to him for the school year closing prior to the May apportionment and shall prepare a statement of the amount in the aggregate payable to each county, and shall deliver the same to the auditor general, who shall thereupon draw his warrant upon the State treasurer in favor of the treasurer of each county for the amount payable to each county. He shall also send written notice to the clerks of the several counties of the amount in the aggregate to be disbursed in their respective counties, and the amount payable to the townships and cities therein, respectively.

"SEC. 4643. Whenever the returns from any county, township, city, or district, upon which a statement of the amount to be disbursed or paid to any such county, township, city, or district shall be so far defective as to render it impracticable to ascertain the share of primary school interest fund which ought to be disbursed or paid to such county, township, city, or district, he shall ascertain by the best evidence in his power the facts upon which the ratio of such apportionment shall depend, and shall make the apportionment accordingly.

"SEC. 4644. Whenever any county, township, city,

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or district, through failure or error in making proper report, shall fail to receive its share of the primary school interest fund, the superintendent of public instruction, upon satisfactory proof that said county, township, city, or district was justly entitled to the same, shall apportion such deficiency in his next apportionment. * * *"

Respondent contends that his determination of the matter in rejecting such corrected list is final and authorized by the authority vested in him under the statute above quoted and that such determination is not subject to review. It is admitted on the part of relator that respondent has authority under section 4643, above quoted, under certain conditions, to make an investigation to ascertain the ratio of the apportionment of primary school money; but it is insisted that his action must be based, as provided by the statute, upon the best evidence in his power to obtain under the circumstances. Authority is claimed by respondent to sustain his contention under section 4643, above quoted. He contends that his decision has been strictly within the provisions of this section.

In applying the provisions of this law to ascertain the ratio of apportionment of primary school money to the different school districts of this State, the department of education has adopted the commendable practice of comparing a current census report with former reports, and in the instant case, in making out the list of names rejected from the census report for 1908 returned by relator, referred to former census reports filed with the department by relator, from which it appeared that certain children were returned for more than one year as of the same age; that the date of birth was different, and other material discrepancies. It cannot be doubted but that for purposes of reference and establishing certain facts, if such facts were all that could be ascertained, former census reports might be used by respondent in fixing

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the ratio of apportionment. It has from the beginning been the policy of this State to maintain its primary schools for the education of children within school age, and to that end it has always caused to be set aside certain revenues, which, by statute, are apportioned to the several counties according to the number of children residing in each county within the age limit, "as the same shall appear by the reports of the several school boards or school inspectors made" for that purpose. The machinery of this statute is not intricate; in fact, it would be impossible to simplify it in any respect. These census reports, made by the several school districts, are the basis upon which the entire system of apportionment of primary school money is founded. That such census reports must be accepted unless they "shall be so far defective as to render it impracticable to ascertain the share of primary school interest fund which ought to be disbursed or paid," in which case authority is given, as already stated, to the superintendent of public instruction to ascertain the facts, and the legislature has been careful to point out to this officer how this shall be done, namely, "* * * he shall ascertain by the best evidence in his power the facts."

Whatever difference there may be between relator and respondent as to the method of ascertaining the facts, there is no dispute whatever but that he must act under this law and exercise his authority according to its terms. Respondent in the instant case had the right and it was his duty to report to relator such names as, from the facts within his knowledge, he considered should be rejected, and in communicating with relator and its officers he was clearly within the exercise of his duty and his authority. Complaint is made on the part of respondent that relator neglected to give prompt attention to his notices. We think it clear from the record that, although there was some

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delay, as soon as relator understood the exact reasons for rejecting these names from this census return, and the information desired, the action on the part of relator was prompt and sufficient. It appears that every effort was made and every source examined, even the records of births, in order to perfect the report to the satisfaction of respondent's department. It is apparent, and appears to be uncontradicted, that the department was satisfied, and a promise made by the deputy superintendent that favorable action would be taken. Respondent therefore at that time, whether it was early or late for the apportionment of that year, was in possession of facts presented to him, ascertained by the best evidence obtainable under the circumstances, and it was then his duty to accept such evidence and act upon it. It appears from this record that he refused to do so and contended in the argument before this court that his action is justified under the law and not subject to review by this court.

Attention is called to the fact that relator in its investigation was satisfied that some of the names had been properly rejected by respondent, but as to the names of 91 children of proper school age, whose parents or guardians resided in the school district at the time the census was taken and which respondent has refused to include in making the apportionment required by the statute, relator insists that under the law the department had no right to exclude, and this court should order that they be included and enumerated.

Relator also contends that five other persons were improperly excluded by respondent from this census report. They were all children of school age. Respondent contends that they should not be included for the reason that it does not appear that their parents or legal guardians resided within the district. The stipulated facts show that three of these children

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are orphans. Two of these orphans reside with their respective sisters, who care for and have control over them. The third orphan has lived with a woman not a relative for several years and she supports and has control over him. Of the remaining two, the father of one lives in Norway, and the child has lived in Muskegon for several years with an aunt, who brought her to this country and has control over her. The other has but one parent, a father, living, who has not resided in this State for eight years. She has lived in Muskegon during all that time with her grandfather, who has cared for and controlled her. She is enrolled in the public schools. None of these five persons, who exercise the custody and control over these children, has adopted them or been appointed guardian over them. These five children have all resided within this school district for several years. They are of school age, and under the law they are entitled to be received and instructed in the public schools. These persons who control, care for, and maintain them, upon refusal to send them to such schools, may, under the compulsory attendance act, be prosecuted, fined, and imprisoned for such neglect. These people in all respects stand *in loco parentis* to each of these children, being actual guardians, and should be considered as their legal guardians under this statute, and they should be included in the school census. Such construction, under the liberal educational policy of this State, is a natural and reasonable one in the interest of these children and for the public good, and cannot be considered as allowing an indiscriminate addition of aliens and nonresidents to the school census, but can extend only to cases where the facts are similar to these under consideration.

In our determination of the important questions presented upon this record we do not in any manner limit the duties and authority of the respondent. He

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is at liberty under this law, of his own motion, to make any reasonable investigation in cases of this kind, for the purpose of correcting defective census reports in order to ascertain the ratio for the apportionment of primary school funds. As already stated, his conclusion must be founded upon the best evidence in his power obtainable.

Our conclusion therefore is that relator, both as to the 91 children and the five children, whose names were rejected by respondent, is correct in its contention that they should be included and enumerated in the census report of 1908, and that it is entitled to the relief prayed. A writ of mandamus will issue in accordance with the prayer of the petition, without costs to either party.

STEERE, C. J., and MOORE, BROOKE, STONE, and OSTRANDER, JJ., concurred. KUHN and BIRD, JJ., did not sit.

PEOPLE v. KENNEDY.

1. CRIMINAL LAW—STATUTES—OBSCENE EXHIBITIONS—CONSTITUTIONAL LAW.

Act No. 103, Pub. Acts 1903, which prohibits indecent or obscene exhibitions in museums or elsewhere, or the exhibition of deformed human beings, diseased or deformed human bodies, or parts or representations thereof, except for purely medical or for scientific purposes, is valid, and the second section of the act, relating to the exhibition of diseased parts of bodies, or representations of the same, which are indecent, is within the title of the act.

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2. SAME—EXCEPTION TO STATUTE.

It was proper to deny a motion of respondents' attorneys to direct a verdict in their favor on the ground that the person who viewed the exhibition was not shown not to be a person who might lawfully view the exhibit within the exception of the statute which permitted exhibitions to medical students or practitioners; the evidence tending to show that the witness was a carpenter, employed in an automobile factory.

3. SAME.

Defendants, who did not offer any requests to charge the jury as to the meaning of the words used in the act, "exhibition," "expose," or "exhibit," were not prejudiced by failure to charge as to the same, or by instructions to the jury that it was for the jury to say whether the exhibition was indecent, whether the respondents exhibited the objects in evidence for scientific purposes or before members of the medical profession, or of medical classes, and whether they were exposed or exhibited under the terms of the statute.

4. SAME—STATUTES.

The terms were used in the law in their usual or ordinary sense.

5. SAME—EVIDENCE.

A conversation held with one of the respondents after the witness had seen the display, tending to show his knowledge that the witness saw the exhibition, was not immaterial or prejudicial.

6. SAME.

Correspondence received by the accused relating to a proposed sale of the exhibit was properly excluded from the evidence as having no tendency to show that it was, in good faith, displayed for sale only.

Error to the recorder's court of the city of Detroit; Connolly, J. Submitted April 17, 1913. (Docket No. 131.) Decided May 29, 1913.

James D. Kennedy and Charles J. Kennedy were convicted of making an indecent and unlawful exhibition of representations of parts of the human body. Affirmed.

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Hugh Shepherd, Prosecuting Attorney, and *Harry Keidan,* Assistant Prosecuting Attorney, for the people.

Bumps & Bishop, for respondents.

MCALVAY, J. Respondents were prosecuted under Act No. 103 of the Public Acts of 1903, entitled "An act to prohibit, discourage and punish the exhibition of deformed human beings, diseased or deformed human bodies, or parts thereof, or the representations of the same, for any other than purely medical purposes," which reads as follows:

"*The people of the State of Michigan enact:*

"SECTION 1. It shall be unlawful for any physician or other person, to expose or keep on exhibition any deformed human being or human monstrosity, except as used for scientific purposes before members of the medical profession or medical classes.

"SEC. 2. It shall be unlawful for any person or persons to so expose or exhibit in museums or elsewhere diseased or deformed human bodies, or parts thereof, or representations of the same, which would be indecent in the case of a living person, except as used for scientific purposes before members of the medical profession or medical classes."

Section 3 provides the punishment for a violation of any of the provisions of this act.

Respondents were arrested, tried, and convicted in the police court for the city of Detroit upon a complaint charging an offense under section 2 of the foregoing act. They appealed to the recorder's court of said city, where a trial before said court resulted in a verdict of guilty, upon which a judgment was duly entered. The case is before this court upon a writ of error.

It appears from the record in this case that the respondents are engaged in the practice of medicine in

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the city of Detroit and occupy the three upper floors of the building located at Lafayette boulevard and Michigan avenue; that at the entrance to their offices is a sign reading, "Doctors K. & K. Museum," upon which there is a representation of a hand over the word "Museum." There is no dispute in the case but that on the upper or fourth floor of this building, contained in cases, were representations, in wax or other substance, of portions of human bodies of both sexes described within the prohibition of this act, and that the exhibits seized by the officers and produced in court were taken from such collection; also that the complaining witness, upon application, went up in company with respondents' office boy, who under the direction of respondents, occasionally took people up to the fourth floor, opened the door for them, and turned on the light. Those taken up by him were always adults and only one at a time.

Respondents contended that for years this collection had been stored in the attic of another building not accessible to anybody; that, after they occupied their present location, they moved it from the attic, had the different pieces painted and mounted, and placed them on this top floor "so that they could be seen favorably, in case we wanted to sell them;" that they tried at different times to make a sale; that they were not exhibited to the public. One of them testified:

"We do not exhibit this stuff to the public. Once in a while if a person calls, we send them up. Sometimes I have sent them up; sometimes I refuse people; and sometimes my brother would send them up there. They are classified and hung up along the walls in cases, and I guess there was an electric light there anyway, and if it was necessary the boy would turn on that light."

The complaining witness was a young man 27 years old, and was a carpenter working at this time for the Packard Automobile Company of Detroit, where he

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had been employed continuously since he came to Detroit.

At the close of the case respondents moved for a directed verdict for several reasons, among others that the evidence did not show the fact that the complaining witness was not a member of the medical profession or a medical class; that it did not show that there was an exhibition within the meaning of the statute; that section 2, under which respondents were prosecuted, was not within the provisions of the title of the act and therefore unconstitutional. This motion was denied by the court, and an exception was taken by respondents.

The errors assigned and relied upon by respondents are:

First, those raised upon the refusal of the court to direct a verdict of "not guilty."

(a) That section 2 of this act, under which the respondents were prosecuted, is unconstitutional because not within the scope of the title of such act, and because the offense charged in section 2 is not embodied in the enacting clause. As appears from the entitling of this act, already given, it is a police regulation clearly within the power of the legislature, and was enacted to prohibit, discourage, and punish the exhibitions therein described. That the prosecution is under the provisions of section 2 is admitted, and also that the representations of human bodies or the parts thereof which were taken from this collection are within the prohibition of the statute. The objection is without merit for the reason that the exhibition of the representations of the parts of the human body prohibited by section 2 of the statute charged and described in the complaint is clearly within the terms of the entitling of the act.

(b) That the exhibition proved was not shown to have been made to a person not within the exception

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of section 2, and was not an exhibition within the meaning of this act. The exhibition prohibited by section 2 is the exposure or exhibition in museums or elsewhere of "diseased or deformed human bodies or parts thereof, or representations of the same which would be indecent in the case of a living person." The exhibition prohibited by this section of the statute might be either public or private and includes an exposure to a single individual.

In this case the pleader in complaint and warrant negatived the exception contained in section 2, and there was evidence in the case, on the part of the people, tending to show that these objects were exhibited to a person who was not a member of the medical profession or medical class, and that the exhibit was not used for scientific purposes. It will therefore not be necessary to discuss the proposition that proving the exception contained in section 2 of the act would be a matter of defense. There was no error on the part of the court in denying this motion.

Another error assigned is as follows:

"The court erred in its charge to the jury because it failed to define and explain the words, 'exhibition,' 'expose,' and 'exhibit,' as used in the statute under which the complaint and warrant were drawn and the violation thereof alleged."

The record does not show that the court's attention was called to this matter, and no request was presented asking the court to so charge. The criticism of the charge is not as to what the court charged, because there is no error assigned upon any portion of it. It is claimed that the attention of the court was called to this in the motion for a directed verdict. We have given an abstract of the reasons relied upon in making this motion, and they are not specific in this regard. The construction of this portion of the statute is one of first intention before this court, and it will be proper to say that respondents' contention is that

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the legislative intent in this statute was to prohibit the exhibition in public of the prohibited subjects, with or without charge, and that the words "exhibition," "expose," and "exhibit" should be construed in harmony with such intent, and the jury should have been so instructed. We do not think that section 2 of this act should be so construed. The prohibition of this section is:

"It shall be unlawful for any person or persons to so expose or exhibit in museums, or elsewhere, diseased or deformed human bodies, or parts thereof, or representations of the same, which would be indecent in the case of a living person, except as used for scientific purposes before members of the medical profession or medical classes."

The legislature intended by this section to prohibit the exposure of these subjects in public or in private to any person or persons, "except as used for scientific purposes before members of the medical profession or medical classes." In our opinion it is a statute enacted in the interest of morality and decency. The terms of the statute are not technical, and the words used should be given their ordinary and usual meaning.

The case was submitted by the trial judge under a charge which briefly, clearly, and correctly states the law in the case from which we quote a portion which covers the criticism of appellants:

"Now, you have seen the exhibits, gentlemen of the jury, which have been produced in this case, and you are to use your common sense and say whether or not they are representations of the human body which would be indecent to be shown in the case of a living person. And it is for you further to say whether or not the defendants at the bar exposed or exhibited in a museum or elsewhere these representations and whether or not they did so for scientific purposes before members of the medical profession or medical classes. There are three elements, as I read the statute, which go to constitute the offense: *First*, the ex-

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posure or exhibition of the representations; *second,* that they were representations which would be indecent in the case of a living person to be exposed in the manner in which they were exposed as claimed by the prosecutor in his proof; and, *thirdly,* that they were not so exposed or exhibited or used for scientific purposes before members of the medical profession or medical classes. Now, if those three things have been established, gentlemen of the jury, beyond a reasonable doubt, you will convict the defendants. * * * The defendants are presumed to be innocent until competent evidence establishes their guilt beyond a reasonable doubt."

We find no error in this charge.

The remaining assignments of error relate to two rulings made by the trial court in ruling upon evidence.

The first relates to a conversation between the complaining witness and one of the respondents after he came down from the fourth floor where he had seen these exhibits and before he left the building. This conversation was admitted over the objection and exception of respondents. This conversation was clearly material to show the knowledge of one of the respondents that the witness had viewed the collection, and none of it could be considered as seriously prejudicial. The record shows that these exhibits could be reached only by going through the offices of respondents upstairs to the fourth floor, and that this was the only means of ingress and egress. The court was not in error in overruling the objection.

The second relates to the refusal of the court to allow the introduction of a letter to one of the respondents claiming to be correspondence relative to the sale of this museum. This occurred while one of the respondents was being examined as a witness in his own behalf, and after he had been permitted to testify that the collection had formerly been stored for ten years and afterwards removed to the place already de-

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scribed; that the figures were fixed up, painted, and mounted so that they could be seen favorably in case respondents should desire to sell them; and that several times they have tried to make a sale. The letter was incompetent and immaterial and properly excluded. We find no prejudicial error in the case.

The judgment of the recorder's court is affirmed.

STEERE, C. J., and MOORE, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

PEOPLE v. AUERBACH.

1. CRIMINAL LAW—HOMICIDE—EVIDENCE.
   While the court, on a trial for murder, did not err in receiving proof that the accused had inquired of the sheriff whether the proceedings taken after death of the decedent would answer in place of a death certificate, immediately following a conversation with the wife of deceased, saying he understood there was heavy life insurance, evidence relating to the insurance and terms and amount thereof should have been struck out on respondent's motion based on the ground that no evidence had been presented showing that respondent knew before the killing of the insurance, which was payable to the wife of decedent.

2. HOMICIDE—CONSPIRACY—TRIAL—CHARGE.
   Where the prosecution claimed that the respondent and the wife of decedent conspired together to murder deceased for his insurance, and the evidence had no tendency to support the theory or that respondent, who claimed that the killing was accidental, knew of the life insurance, the subject should have been withdrawn from the jury, failure to do so constituting prejudicial error.

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3. SAME—MURDER—PRELIMINARY EXAMINATION.

Evidence that respondent and decedent were out hunting, when the latter was killed by a shot from behind, that respondent made some effort to keep matters secret, claiming that he set his gun against a stump and it fell off, was discharged and killed his companion, that the sheriff and others experimented with the same gun in the manner described by the prisoner and the experiments tended to contradict the claim of respondent, and that the parties had previously been very friendly, the wife of decedent and the prisoner especially so, and respondent had conducted himself peculiarly and had displayed a purpose to keep the matter secret after the shooting, warranted the examining magistrate in holding the accused for trial.

4. CRIMINAL LAW—PROSECUTING ATTORNEY—APPOINTMENT OF SPECIAL PROSECUTOR—HOMICIDE—TRIAL.

Under 1 Comp. Laws, § 2563 (1 How. Stat. [2d Ed.] § 1160), the appointment of a special prosecutor by the trial court because he considered the prosecuting attorney disqualified, who acquiesced in the action of the judge and withdrew, was justified and it will be presumed that a sufficient inquiry was made to sustain the order.

5. SAME—EXPERIMENTS.

It is within the discretion of the trial court to permit or refuse to permit experiments to be made in the presence of the jury.

6. SAME.

And in ruling out evidence of experiments made by a witness with a shotgun which was of different construction and size than the rifle of respondent, that discharged the fatal shot, the discretion of the court was properly exercised.

7. SAME—TRIAL—VIEW—RIGHT TO ATTEND—WAIVER.

A respondent may waive his right to attend a view of the premises in a criminal proceeding if he is at liberty and not prohibited by the court from attending, but the jury should not receive any evidence in his absence.

8. APPEAL AND ERROR—ARGUMENT—CONDUCT OF PROSECUTOR—SAVING QUESTIONS FOR REVIEW.

In order to review improper argument of the prosecuting attorney it is essential to secure a ruling of the trial court.

9. CRIMINAL LAW—CHARGE—TRIAL.

The court should not have charged the jury as to the

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course of the bullet into the body of decedent that it passed through horizontally, when the evidence in behalf of the accused tended to show the contrary.

10. SAME.

And it was error to instruct the jury that the prosecution claimed the motive of the crime was respondent's infatuation with the wife of deceased, and their mutual understanding to murder him in order to realize on the life insurance, since the evidence supporting that contention should have been withdrawn from the consideration of the jury.

11. APPEAL AND ERROR—CRIMINAL LAW.

The court, on error, will not review the refusal to give requested instructions, the subject of which is covered by the general charge, or objections to the introduction of evidence admitted without exception and properly raised for the first time on motion for a new trial.

Error to Lake; Withey, J. Submitted April 18, 1913. (Docket No. 133.) Decided May 29, 1913.

Oscar M. Auerbach was convicted of murder in the first degree. Reversed.

B. N. Savidge, for the people.

Thomas Smurthwaite (James O. Murfin and *Pierce Butler*, of counsel), for respondent.

STONE, J. The information filed by the prosecuting attorney charges the respondent with having on the 19th day of September, 1912, at the township of Pleasant Plains, in the county of Lake, killed and murdered one Harry W. Fisher. Upon the trial of the case, which occurred in the month of December, 1912, the respondent was convicted of the crime of murder in the first degree, and sentenced for life to the State prison at Jackson. The case is here on writ of error, and exceptions after sentence.

The deceased was living on a somewhat new farm which had been purchased by him some seven miles

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southwest of Baldwin, which he was improving, and was engaged in clearing, stumping, and ditching the land. He had formerly resided with his family in the city of Chicago and last came to this place in the spring of 1912. In the month of July he had been joined by his wife and two children, a boy nine or ten years old and a girl five, and they continued to live with him on the farm to the time of his death. The respondent was a member of this family and had been with the deceased since the spring of 1912. These parties lived together on this farm on terms of apparent friendship, and there was nothing on the surface to indicate anything except cordial good will between them all. They were all persons of intelligence and good education; the record showing that respondent is a civil engineer, and had been engaged in railroad construction work in Chicago. Respondent while working for deceased had charge of a steam grubber or stump machine used on the place.

The deceased met his death on the morning of September 19th before breakfast, and the only direct evidence of the circumstances attending his death was the testimony of respondent taken upon the coroner's inquest held at the house on the day aforesaid. On that occasion respondent testified: That he and deceased went hunting partridges that morning with a rifle, which appears to have been a 33-caliber Winchester. That some partridges flew up, and deceased did not want respondent to shoot at them because the gun was a high-power gun, and he did not want respondent to shoot on the wing for fear of hitting some one. That thereupon respondent leaned the gun against a stump carelessly, he did not just know how, and turned around to roll a cigarette, and the gun fell down, went off, and shot deceased. That when respondent turned around deceased had fallen. Respondent ran to him, turned him over, and saw that he was dead. Respond-

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ent thinks the gun was cocked when he leaned it against the stump. That deceased did not speak after he was shot, but moaned once or twice. Respondent thinks deceased was facing the gun, and thinks he was about to sit down and light his pipe.

The sheriff of the county gave testimony as to the further statement of respondent before the coroner's jury, as follows:

"After the jury was impaneled, we went into the room where the body was lying. Then he (respondent) told us, and he also showed us after we went to the ground where the gun was setting when he set it down against the stump, as he claimed. He claimed that he and Mr. Fisher went out partridge hunting the day before, and that they flushed a few birds and were unable to get any of them, and this morning they went out to try again, and as they came near the place where Fisher's body was supposed to be found they flushed a bird or two, and one of them lit in near this place, and they followed it up, and the bird flew up, and he kind of made an effort to shoot or something of that kind, and Fisher warned him that he should not shoot because it was a high-power gun and there were people living off in that direction; that there might be some danger; so he didn't shoot, and then one of them proposed that they take a smoke before they went in to breakfast. It was getting about breakfast time. So he turns and sets this gun down against this small stump. Well, then he turns facing the north. Fisher was south of him, and he was contemplating something of that sort, rolling a cigarette, when he heard the gun go off and looked around and Fisher was down and so was the gun. He claimed he ran to Fisher; he was lying on his face; and he turned him over on his back, and Fisher gasped a very few times and was dead. This occurred on a side hill. I will say a slope up from the north and also from the east, and where they claim this occurred was a kind of clear space with bushes comparatively clear around it, and Fisher laid to the south end of this little open space, and at the north end there were three stumps, or rather two stumps and a fragment or part of a stump;

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this set in a sort of a triangle, not a perfect triangle, but a little bordering on that. The fragment of stump was the stump farthest to the south; that is the stump or part of the stump which he claimed he set the gun against. Between the two stumps kind of north of that there was kind of a small log laid in there, or pole rather, and he claimed he stood between these two stumps facing the north when the gun was discharged. I saw the distance measured from the muzzle of the gun to where Fisher's feet were, and that was nine feet. Of course, I saw it measured another time when—well, there were other parties that had a little something to say about where the body lay, and I don't think they were as accurate as to measuring just from the muzzle of the gun or Fisher's feet, but they made it 12 feet. Mr. Auerbach didn't describe where the man lay as much as Mr. Sjoden. Mr. Sjoden was the one who claimed that he moved the body and also the gun. The one measurement was taken when Mr. Auerbach was present; that measurement showed a distance of 12 feet. This was made for the coroner's jury. I should say that the distance was half a mile from the Fisher home."

There is much detail in the evidence of witnesses who were upon or near the premises who were notified by respondent of the death of Fisher. One witness testified he was just going to his work of ditching from Mr. Sjoden's house, which was situate south of the Fisher home, when respondent came running to him, apparently out of breath and excited, and informed him that Mr. Fisher had been accidentally shot. They notified other parties, among whom were Mr. Sjoden, and this witness returned with respondent to the place where the body lay. The body was then lying upon the back. The witness described the location of the gun substantially as already stated, and testified that he remained there until Mr. Sjoden and others came with a team to remove the body to the house. The respondent, soon after the body was removed to the house, obtained an automobile and went to Baldwin and called upon an undertaker there, who testified that

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respondent came to his place and informed him of the death of Mr. Fisher about 10 o'clock a. m.; that respondent came into the store and called the witness to the back part of the store and told him that Mr. Fisher was dead, had been accidentally shot; and that he would like to have the witness go down and prepare the body for shipment; would like to get the body away on the night train. Witness testified that he asked respondent if he had had any doctor, and he said, "No," and he was then told it would be necessary to have a coroner's inquest before witness could do anything, and respondent asked witness what would be necessary; and, as there was no coroner in the county, witness told him that the sheriff would be the man to look after that. Whereupon respondent asked witness to see the sheriff, and the witness went and called for the sheriff over the phone, but did not get him, as he was down town. They found the sheriff, and witness asked respondent if he wanted him to go out there with the hearse and get the body that afternoon, and he told him that he would rather not, because he did not want this to be made public at all, wanted it to be kept quiet as possible. A justice was found, and the parties all went to the Fisher home; and it was found necessary for respondent to return again to Baldwin after some men to serve on the jury.

Another witness, who was engaged in the lumber and hardware business at Baldwin, testified that he saw the respondent drive into town that forenoon in an automobile. This witness testified that when he first met respondent they shook hands and there was some general talk about bills which the witness was to send in; that respondent then talked with him and asked for some figures on some stuff witness had ordered that had not yet arrived; that respondent then requested witness to get him some water to put in the automobile, which he did; and the witness testified

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that he did not observe anything in the appearance or demeanor of the respondent at this time different from what it had been on other occasions. Respondent asked witness if he cared to ride down to the depot with him in the automobile, which the latter did; that they talked on different subjects going down to the depot. The witness then testified:

"When we got down to the depot, as I went to step out of the automobile, he spoke to me and said, 'George, can you keep a secret?' And I says to him, 'I guess I know it,' or something to that effect; and he says 'Do you?' and I says 'Yes;' and he says, 'Who told you?' and I says, 'My brother, he is a deputy sheriff, and he told of it.' He says, 'Is that so?' I says, 'Yes.' He says, 'I want to send some telegrams; do you know this agent in here?' I says, 'Yes;' and he says, 'What kind of a fellow is he?' and I says, 'Well, Harry is a good fellow.' Harry was the fellow's name. He says, 'I wish you would go with me and help me send these telegrams and ask the agent to keep it still.' He says, 'I don't want a lot of gossip about it;' and I says, 'All right;' and I asked him then where the accident occurred; and he said it was down in a swale near the Cross cottage; and I says, 'What, was it accidental?' and he says, 'Yes, he only gasped once or twice;' and I says to him, 'Was there somebody with him?' and he says, 'Yes, I was with him.' So he went in and sent the telegrams which I wrote."

Upon the subject of life insurance the sheriff testified as follows:

"Shortly after Mr. Auerbach and I got to the Fisher home, why, he had been in the house, he came out of the house and asked me if our proceedings would answer the same as the death certificate, as he understood that Fisher was heavily insured. I had no particular talk with him at that time, only I told him I thought it would."

On cross-examination the same witness testified upon the subject as follows:

"I said Mr. Auerbach and Mrs. Fisher were talking

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together, and that Mr. Auerbach then asked me if the proceedings we were taking would take the place of a death certificate; it was just before Auerbach left the Fisher home to go after the jurors, or just after he got back."

This is the only testimony in the case tending to show that respondent had any information or knowledge upon the subject of insurance upon the life of Mr. Fisher.

Upon the trial of the case, and against the objection and exception of respondent's counsel, evidence was offered and received showing that deceased carried insurance upon his life in the sum of $100,000 in the Prudential Insurance Company of America, consisting of two policies of $50,000 each, bearing date December, 1908, payable at his death, upon which policies there were two loans aggregating nearly $6,000. Ethel Patterson Fisher, wife of the deceased, was the beneficiary in each of these policies. It was also in evidence that the life of Mr. Fisher was also insured in the Northwestern Mutual Life Insurance Company by one policy of $100,000, on which there had been a loan of $6,600; that the date of that policy was December 5, 1908, and Ethel Patterson Fisher, wife of the assured, was the beneficiary; also, that there were two policies issued by the Mutual Benefit Life Insurance Company of Newark, N. J., amounting to $50,000, consisting of $25,000 each, bearing date March 17, 1908, upon which there had been a premium loan of $1,600. Mrs. Fisher was the beneficiary here also. All the policies matured and became payable upon the death of Harry W. Fisher, and all were incontestable after one year from their dates, except for nonpayment of premiums.

Counsel for the respondent moved the court to strike out all testimony relating to the insurance on the life of deceased. The court said:

"The first head of the general motion is that the testimony with regard to the insurance be stricken

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out, for the reason that no knowledge is shown of the insurance on the part of the respondent. Knowledge on the part of the beneficiary will be presumed. Testimony of the relations of the respondent with the beneficiary are on the record. The statement of the respondent immediately after the death, or very soon after the death, showing that he then knew of the insurance, is in the record. I think the testimony in general is sufficient to retain the admission and retention of the testimony in regard to the insurance. * * * The motion is overruled and exception noted."

The evidence is uncontradicted that the body of the deceased was removed from the Fisher home to the undertaker's place of business at Baldwin on the evening of September 19th, and remained there until Mrs. Fisher and the children left with it upon the evening train of Friday, September 20th, bound for Chicago, where they arrived on the next morning.

The respondent was arrested before he left the Fisher home on the evening of September 19th, and remained in the custody of the sheriff from that time on until he was bailed out about the 14th of October.

Evidence was offered tending to show, and it is uncontradicted, that Mrs. Fisher remained in Chicago during Saturday, and while there met a friend who was engaged in the insurance business, who suggested and prepared the proofs of loss under the various insurance policies and obtained Mrs. Fisher's signature thereto, and it appeared that she filled out the answers to some of the questions asked her. These blanks were filled out and signed by her and sworn to before a notary. She then, with some friends, accompanied the remains to Independence, Iowa, the place of burial.

Before pleading to the information, respondent, by his counsel, moved to quash the information, for the reason that there was no jurisdiction on the part of the court because of the insufficiency of the testimony before the justice on the preliminary examination; and

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that there was no evidence that would warrant holding the respondent to the circuit court. This objection was overruled and an exception noted.

Before the arraignment of the respondent in the circuit court the following occurred:

"*The Court* (addressing Mr. Cutler, prosecuting attorney): What is the situation in this Auerbach case, do you propose to act or not?

"*Mr. Cutler:* No, I am going to let Mr. Savidge proceed.

"*The Court:* In that case, Mr. Clerk, you may enter up an order appointing Mr. B. N. Savidge special prosecutor.

"*Respondent's Counsel:* We take a formal objection to a stranger appearing in the case for the people.

"*The Court:* Well, the order when drafted will recite the reasons why Mr. Savidge is appointed. It will be on the request of Mr. Cutler that Mr. Savidge be appointed, and because the court considers Mr. Cutler disqualified.

"*Respondent's Counsel:* We make the formal objection when the order is filed. * * *

"*Respondent's Counsel:* Has the order that the court made been filed?

"*The Court:* Yes, it has. The order appointing Mr. Savidge.

"*Respondent's Counsel:* As we understand the matter, Mr. Cutler is not interested by relationship to any of the parties, and has no personal interest in the case, nor the results thereof; therefore we enter a formal objection to the appointment of Mr. Savidge. We have nothing personal to Mr. Savidge, however, in the objection.

"*The Court:* Proceed.

"*Respondent's Counsel:* Give us an exception."

Whereupon, the respondent standing mute, a plea of not guilty was entered by order of the court, and the trial proceeded.

There was no *post mortem* examination.

It was a disputed question whether the bullet entered the body from the front or in the back. Upon

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the theory that it entered the back, there was testimony tending to show that the bullet entered the body just below the shoulder blade on the right side, at a point nearly central between the back and the side; the point of exit being about three inches below the left nipple. There was testimony that the wound beneath the scapula was smooth, and the wound in the front was ragged, and a trifle larger. In the back one rib was broken, and in the wound in the front two ribs were broken. Other testimony tended to show that the ball may have entered from the front, or at least that it could not be definitely determined in the absence of a *post mortem* examination. It appeared that the wound in front was substantially opposite the one in the rear, as to the height; both being 50½ inches from the bottom of the feet.

Upon the trial evidence was offered and received upon the subject of experiments made by witnesses with the gun used by respondent at the time of the death of the deceased. The testimony tended to show that these experiments were made at the place where Mr. Fisher met his death. Testimony was also offered on behalf of respondent of experiments made by witnesses at the same place with a shotgun differing in length, size, and construction from the Winchester used by respondent on the morning in question.

At the close of the testimony the court announced that a request had been preferred early in the trial that the jury be permitted to view the premises where the tragedy was alleged to have occurred; and the court, after ascertaining that the jury desired to make the view, used the following language:

"Do any of the counsel on either side want to go with the jury?

"*Acting Prosecuting Attorney:* I do not, your honor.

"*Respondent's Counsel:* Well, I won't go. Mr.

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Adams says he does not want to go unless the other side is represented.

"*The Court:* Well, now, if they go there I think that some one who knows ought to take this piece of stump and put it in place there, do you agree that that should be done?

"*Acting Prosecuting Attorney:* I will.

"*Respondent's Counsel:* Well, we will agree upon some party, Mr. Savidge, and we will discuss about it; for instance, now, Sjoden was there at the place and knows just where it came from. We will agree that he can place it.

"*Acting Prosecuting Attorney:* I will agree to that.

"*Respondent's Counsel:* He is the one that directed the jury to the locality.

"*The Court:* Now, the jury will remain in charge of the same officers who are under the same oath, and the oath will continue in full force all the time until the jury is again seated. And I think that no one should be allowed to go with them but you two officers, unless the man Sjoden is here. If he is not here, the sheriff will go and send him to that locality.

"*Respondent's Counsel:* Well, that is true, your honor; he is there at the house; he lives in the house now.

"*The Court:* You go by the house, I suppose?

"*Respondent's Counsel:* Yes, that is right, too.

"*The Court:* Very well, the officers can stop there and get him, and if it happens that he is not there, why go where he is, and if you are not able to get him probably you can see—some of the officers can see where the piece goes, and put it back. Of course, you will not allow any one to talk with the jurors at all or approach them in any way; and there will be no discussion among the jurors neither on the ground nor anywhere about it. I will say more to you about that if we make this arrangement. And Mr. Sjoden, or whoever places that stick in place, is not to discuss in any manner, or say anything at all; he is simply to go there and put that stick in place and go away. Not stay around there or show anybody anything.

"*Acting Prosecuting Attorney:* Who will make known to Mr. Sjoden what is expected of him?

"*The Court:* One of the officers in charge; either one of the officers. The officers will take the stick

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with them and tell him that he is to place the stick in proper position as it was.

"*Respondent's Counsel:* What view of the premises does your honor permit, the locality from the house and barn?

"*The Court:* Well, they may do such things as they deem material there while they are on the ground.

"*Respondent's Counsel:* All right."

The court then instructed the jury that they were not to discuss the case at all, even among themselves, nor make up any opinion at all until the case was finally submitted to them; that they were to keep their minds open to conviction either way; and that they were not to hear anybody else talk about the case. No objection or exception was taken to the order of the court in this matter.

During the argument of the case to the jury, the acting prosecuting attorney, in alluding to the conduct of Mrs. Fisher with reference to the insurance, used the following language:

"What does she do? She sends for an insurance broker and puts in her time in Chicago while waiting there. And it would almost seem as though they sent and got the insurance blanks before he died—

"*Respondent's Counsel:* I take an exception to that."

In this connection it does not appear that the court made any ruling. There had been other exceptions taken to the argument of counsel prior to this time, and the ruling of the court had simply been to direct the prosecutor to proceed.

Although the prosecuting attorney in his brief has stated that he does not believe that this case comes within the rules laid down in the cases of conspiracy, yet a reference to his opening statement, as well as a reference to the charge of the court, and its reasons given for deying the motion for a new trial, will show that the case was tried upon the theory of a conspiracy

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or combination between respondent and Mrs. Fisher. In its charge to the jury the court, among other things, said:

"Considerable testimony has been admitted in the case with regard to the relations of the respondent and the deceased's wife, Mrs. Fisher. This has been introduced largely for the purpose of showing an opportunity for Mrs. Fisher and the respondent to arrive at an understanding with regard to the taking-off, or death, of Mr. Fisher. The theory of the people is that that was arranged between Mrs. Fisher and the respondent for the purpose of realizing upon the life insurance carried by Fisher. And in view of that claim, and of that theory, it has become the duty of the court to admit in evidence in this case the acts of the parties both soon before the tragedy in question and the death of Mr. Fisher, and following along until the time of his burial. And the purpose of that testimony is for you to say—is to enable you to be able to say what the truth of the matter is. * * * It is claimed that the motive and actuating cause of this deed on the part of the respondent was the infatuation with Mrs. Fisher, and agreement and understanding reached between him and her that he should do this deed, and thus that she might realize upon the great life insurance carried upon her husband's life. * * * If you can arrive at a verdict in this case, it must be in the light of the conduct of these people and the relations that they sustained one to the other. If there was no understanding between Mrs. Fisher and the respondent, then there ought to be no conviction in this case. I don't mean by that, and the people do not mean by that, that you should be able to find Mrs. Fisher guilty of adultery with the respondent; that is not required, but the claim is that their conduct shows that their relations were unusual, and that ample opportunity existed for them to enter into this arrangement, if they were so disposed. * * * Bear in mind the testimony of the early inquiries by Mrs. Fisher in regard to the life insurance, and the inquiry a little later on the part of the respondent in regard to the life insurance, and what would be necessary to keep it intact."

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In his reasons for denying the motion for a new trial the circuit judge, among other things, said:

"While there are other views that may be well taken, the case was tried upon the theory that the respondent and Mrs. Fisher arranged the killing, were both interested and guilty, and that Auerbach fired the shot."

The court in its charge used the following language:

"If, in your opinion, it makes any difference in the case, take into consideration and carefully analyze the testimony as to whether the shot was fired from the back or from the front; give especial attention and most critical examination to the fact of the course of the bullet through the body; it stands an admitted fact in this case, gentlemen, that the bullet passed through the body horizontally, that is on a direct, true line, say whether that can be true under the circumstances revealed in this case."

1. We shall first consider the matter of the insurance upon the life of Mr. Fisher, and the rulings of the court relating to the evidence upon that subject, as we deem that the most meritorious question raised by the assignments of error.

We think that the court did not err in receiving evidence of the statement of the respondent, when he made the inquiry of the sheriff above referred to, for everything cannot be proved at once upon the trial of a case. But at the close of the evidence of the fact, and amount, of the life insurance, all of which had been received against the objection and exception of respondent's counsel, and in view of the fact that all of the evidence of knowledge of such insurance on the part of the respondent was that above set forth, we are of opinion that the court erred in refusing to strike out all of the testimony upon the subject of the life insurance.

There was no evidence that respondent had any knowledge of the existence of the insurance at the time of the death of Mr. Fisher. It is more than probable

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that he had been informed of this fact by Mrs. Fisher subsequent to the death, as he went direct from having had a conversation with her to the sheriff at the time he made the inquiry as to proofs of loss. The jury should not have been permitted to speculate or guess upon that question. As against the presumption of innocence, they should not have been permitted, in the absence of evidence, to presume that respondent possessed this knowledge at the time of or prior to the death of Mr. Fisher. The damaging effect of the course pursued is made apparent by an examination of the record and the charge of the court. The proper practice and course to be followed in such a case is well stated in *People* v. *Saunders*, 25 Mich. 119, where Justice COOLEY said:

"It is complained that the acts and declarations of Winters were allowed to be given in evidence before proof had been made of any conspiracy. As this exception regards the order of proof merely, we think it is not one that can avail in this court. The proper order of proof in cases of conspiracy is, first to give evidence of the unlawful combination, and afterwards to show the acts of the conspirators in pursuance thereof, or in some manner to connect them severally therewith. But it often happens that the existence of the conspiracy is only made out by inference from the acts and declarations of the several parties thereto; and to exclude evidence of these until the conspiracy is established in some other way would, in many cases, give the guilty parties immunity. There is no class of cases in which it is more important that the circuit judge should have a large discretion as to the order in which evidence should be received; and this discretion cannot be reviewed on error except in clear cases of abuse, of which we discover no proof here. The opening of the case by the prosecution and any further explanations that may be called for, will generally enable the judge to exercise his discretion in such manner as, while not shutting out proper evidence, shall at the same time protect the accused from being prejudiced by testimony which, in the end, shall prove

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irrelevant, or not legally competent to charge the party on trial. And whenever facts are proved which depend upon other facts to give them a bearing upon the guilt of the accused, if such other facts are not put in, he has his remedy by motion to strike out the evidence.

"In this case it was sought to connect the several parties charged by evidence of their separate acts and statements. This was, of course, competent. The danger from this is that the statements of one implicating the others as well as himself, may tend unjustly to prejudice the case of the others; but this must be guarded against by proper instructions from the judge."

We feel warranted in saying, in the light of this record, that there was no competent or legal evidence —in fact, no evidence—that respondent had any knowledge whatever of the existence of the life insurance before the death of Mr. Fisher. This was essential to the admission of evidence of the fact of insurance, and the motion to strike out all evidence upon the subject of life insurance should have been granted.

A somewhat similar question arose in the case of *People* v. *Morgan,* 124 Mich. 527 (83 N. W. 275). There the respondent was upon trial for the murder of one Gillis. In that case Justice GRANT said:

"It was error to permit evidence that Mr. Bowen's life was insured. The prosecuting attorney stated that he would connect this evidence with what the prisoner had stated,—that 'there was a thousand dollars in it for any one who would do away with Dave Bowen.' The court admitted it, stating that, if the connection was not made, it would certainly be immaterial. The prosecution did not show that respondent had any knowledge whatever of this insurance; yet it is evident that this was urged as one of the reasons for his conviction. * * * Knowledge of this insurance on the part of the respondent should have been shown before introducing evidence of the fact of insurance."

Justice LONG concurred with Justice GRANT in reversing the case. MONTGOMERY, Chief Justice, said:

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"I have some doubt upon the question relating to the life insurance. The record discloses that Mrs. Bowen knew of the insurance. There is no direct testimony to the effect that respondent did, but I think the jury might be permitted to infer such knowledge from the other circumstances of the case. If it is found that he was paramour to Mrs. Bowen, this fact, taken together with his offer of $1,000 to any one who would make away with Bowen, might justify an inference of knowledge."

Justice HOOKER concurred with MONTGOMERY, Chief Justice. Justice MOORE said:

"I cannot agree with Justice GRANT that a verdict of acquittal should have been directed, nor can I agree with Justice MONTGOMERY that the case should be affirmed. The record is barren of any testimony from which the inference can be fairly drawn that respondent had knowledge that Mr. Bowen had a life insurance policy which was payable to Mrs. Bowen. It is the testimony of Mr. Bowen that when he left Mrs. Bowen he took this policy with him, and that he could not say that his wife knew whether the policy was in force since then or not. There is no testimony that the respondent ever knew of the existence of this policy. I agree with the opinion of Justice GRANT as to the incompetency of the testimony in relation to the life insurance, and, for this error, think the conviction should be reversed and a new trial granted."

It is evident from an examination of this record that the subject of life insurance, and the amount thereof, and the fact that it was payable to Mrs. Fisher, were considered strong elements in the case, and these facts were urged by the prosecution as prominent reasons for the conviction of the respondent. We are of opinion that the refusal to strike out this evidence, and to withdraw the same from the consideration of the jury, constituted prejudicial and reversible error.

The only theory of the prosecution, of a conspiracy between respondent and the wife of deceased, includes the life insurance. That subject being eliminated

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from the case, there was no other evidence tending to show a conspiracy sufficient to carry that question to the jury. The evidence not supporting that theory, the whole subject of a conspiracy should have been withdrawn from the jury, and the court erred in that part of its charge submitting that question in the language herein stated. The submission of these matters was highly prejudicial. The court in denying the motion for a new trial said:

"I have had and yet have some misgiving in regard to the legal sufficiency of the proofs."

As, in our view of the case, it must be sent back for a new trial, we think it our duty to consider some other questions that have been properly raised by exceptions and assignments of error.

2. It is urged by respondent's counsel that the court should have dismissed the proceedings and quashed the information before the jury was impaneled, because the preliminary examination, a record of which was before the court, showed that there was no competent evidence introduced before the examining magistrate authorizing him to hold the respondent for trial.

We have examined the record relating to the examination before the magistrate, and are unable to agree with respondent's counsel that, as matter of law, we should say there was not sufficient evidence to hold the respondent for trial. The evidence before the magistrate was substantially the same as upon the trial. The circumstances surrounding the case, in the very nature of things, were themselves peculiar and unusual. Circumstances testified to by witnesses as to subsequent conversation and conduct of the respondent, some of which it was claimed showed evidence of a desire to keep the matter of the death of Fisher secret and to avoid publicity, the evidence of the experiments, all of these facts taken together, we think, justified the magistrate in holding the respondent for trial; and we

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do not think that the court erred in overruling the motion to quash the information.

3. This brings us to the subject of the order of the court appointing Mr. Savidge as special prosecutor in the case. We might well dismiss this subject for the reason that the record fails to show the order made by the court appointing Mr. Savidge. All we have is the announcement of the court that the order would be made on the request of Mr. Cutler, the prosecuting attorney, that Mr. Savidge be appointed because the court considered Mr. Cutler disqualified. When the court asked the prosecuting attorney if he proposed to act in the case, and he replied, "No, I am going to let Mr. Savidge proceed," it might well be claimed that he there acquiesced in, if he did not request, the appointment of Mr. Savidge as an assistant in the case.

Section 2563, 1 Comp. Laws, provides that, whenever the prosecuting attorney is unable to attend to his duties, if the court deems it necessary, it may, by an order to be entered in the minutes of such court, appoint some other attorney at law to perform for the time being the duties required by law to be performed by the prosecuting attorney, who shall thereupon be vested with all the powers of such prosecuting attorney for that purpose.

For aught that appears in this record, the court may have made the proper examination to reach the conclusion that it deemed it necessary to make this appointment. Such course should be presumed, in the absence of anything to the contrary. It appears here that the court announced that the order would recite the reasons why Mr. Savidge was appointed; and that it was because the court considered the prosecuting attorney disqualified.

Section 2569, 1 Comp. Laws (a more recent statute), provides that the prosecuting attorney may, under the direction of the court, procure such assistance in the

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trial of any person charged with the crime of felony as he may deem necessary for the trial thereof. There is no claim here that Mr. Savidge was disqualified, or that he was an improper person to act in the case.

This court held, in *People* v. *Trombley*, 62 Mich. 278 (28 N. W. 837), that the assistant prosecuting attorney, who by statute is required to discharge all the functions and perform all the duties of the office of prosecuting attorney in case of absence, disability, or sickness of his superior officer, has power to sign, verify, and file an information when the statutory contingency arises.

There seems to be no question that such officer is competent to take charge of the trial of a criminal case.

This court, in the case of *People* v. *Bemis*, 51 Mich. 422-424 (16 N. W. 794), said that the prosecuting attorney, and any one associated with him, must be exclusively a representative of public justice, and stand indifferent as between the accused party and any private interest.

There is nothing in this record to show that Mr. Savidge's position was assailable upon any of these grounds. This precise question has never been presented to this court before. The following cases refer to the subject generally: *Webber* v. *Barry*, 66 Mich. 127 (33 N. W. 289, 11 Am. St. Rep. 466); *Sayles* v. *Genesee Circuit Judge*, 82 Mich. 84-89 (46 N. W. 29); *People* v. *Fuhrmann*, 103 Mich. 593 (61 N. W. 865); *People* v. *O'Neill*, 107 Mich. 556-559 (65 N. W. 540); *People* v. *Thacker*, 108 Mich. 652 (66 N. W. 562).

We do not think that the court erred in its action in this matter.

4. The forty-first and forty-second assignments of error are to the effect that the court erred in ruling that the witness Kinney could not give his opinion as to experiments made similar to those made by the

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people's witnesses. The people had offered testimony bearing upon the subject of experiments made with the identical gun which was in possession of the respondent on the morning of the 19th of September, at the place where Mr. Fisher was said to have been killed. The experiments made by the witness Kinney were not made with the gun above referred to, but with a double-barrel shotgun, which differed in length and construction from the gun in possession of respondent. The witness was asked to state the result of these experiments, whether or not falling in different ways and striking the prongs the gun could be discharged. This was objected to as incompetent. The court in ruling upon the question said:

"I don't think that is a matter for expert testimony. The further difficulty with that is that the guns are entirely dissimilar, the trigger guards are dissimilar, the action of a shotgun and rifle is known to be dissimilar. I will sustain the objection."

To which ruling counsel for respondent excepted.

The weight of authority seems to be that it is within the judicial discretion of the trial court whether to permit experiments relevant to the issue to be made before the jury during the trial, or to refuse to permit them, and an appellate court should decline to interfere with the ruling unless an abuse of its judicial discretion is clearly made to appear. *Spires* v. *State*, 50 Fla. 121 (39 South. 181, 7 Am. & Eng. Ann. Cas. 214, and note). In this note will be found a large collection of the cases upon this subject.

We are of opinion that the court did not err in its ruling, especially for the reason that the guns were dissimilar, and such evidence might have had a tendency to confuse rather than to enlighten the jury.

5. It is next urged that the court erred in permitting the jury to view the premises where the death occurred. We have stated in detail what the record

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shows upon this subject. The record fails to disclose upon whose motion the view was permitted. It is apparent that it was by the consent of counsel for both parties. But it is urged by respondent's counsel that this view was a proceeding in the case which could not have taken place without respondent's presence, and that he could not waive his right to be present.

It will be borne in mind that it appears that respondent was not confined in jail, but was on bail during his trial. There was no express order of the court that he should be prohibited from attending the view. However, it does appear that the court said, substantially, that nobody but the officers would attend, with the exception of the man Sjoden.

Section 11951, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 15123), provides that no person indicted for a felony shall be tried, unless personally present during the trial.

Where one on trial for a felony, who was out on bail, failed to appear at the hour to which court adjourned pending the jury's deliberation, a verdict rendered in his absence was held valid, and a waiver on part of respondent. *Frey* v. *Calhoun Circuit Judge*, 107 Mich. 130 (64 N. W. 1047).

Section 11952, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 15124), provides that the court may order a view by any jury impaneled to try a criminal case whenever such court shall deem such view necessary. The matter of the view of the place where an alleged crime has been committed seems to be discretionary with the court. The question whether the purpose of the view is to furnish new evidence, or to enable the jurors to comprehend more clearly by the aid of visible objects the evidence already received, is one upon which the courts seem to be divided; the better doctrine being the latter of the above propositions. It certainly would be improper to permit a witness to

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testify as to the location of objects, or as to any other material point in the presence of the jury while taking the view. 12 Cyc. p. 537, and cases cited.

The most serious question here is whether permitting the witness Sjoden to place the stump in its original position was evidence in the case. Much authority may be found collected in the note to the case of *Elias* v. *Territory*, 9 Ariz. 1, found reported in 11 Am. & Eng. Ann. Cas. 1153-1159.

The only Michigan case that we have been able to find bearing on this question is that of *People* v. *Hull*, 86 Mich. 449 (49 N. W. 288). There the jury viewed the premises and were accompanied by the circuit judge, counsel, officers of the court, and representatives of the daily press. The respondent was confined in jail during this time. The principal complaint in that case was that the court erred in not keeping the jury together under the supervision of the court while the view was being made, and in not taking measures to prevent the jury from partaking of spirituous liquors while the view was being had. Justice LONG, in speaking for this court, said:

"The court was not in error in permitting or directing a view of the premises by the jury; but we think it was the duty of the court, *in the absence of the respondent*, to have kept the jury while on their way to, and on their return from, and in their view of, the premises, under the supervision of an officer, so that no person might communicate with them or express any opinion, or give any directions in their hearing; *for anything which took place which was in the nature of testimony certainly could not be given to the jury in the absence of the respondent.*"

We think that the weight of authority is to the effect that a respondent who is at liberty may expressly waive his right to accompany the jury, but that the jury in no case should take anything in the nature of evidence, in his absence. We also think that the re-

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spondent had the right to accompany the jury, had he desired to do so in this case. More than this, it is not necessary for us to decide, as the question is not likely to occur upon a new trial in view of what we have said.

6. Error is assigned upon the argument of counsel for the people. This argument consisted of a somewhat extravagant statement as to the conduct of Mrs. Fisher with reference to making proofs of loss while in Chicago. The record is not clear that the attention of the court was called to the matter, or that the court was requested to make a ruling upon the subject. We are not able to say that the court refused to rule in this instance. The language used was doubly objectionable, as it was not only an extravagant statement in view of the evidence, but it goes to show the use which was made upon the argument of the subject of the life insurance. Such error is not likely to occur upon a new trial.

7. The eightieth assignment of error complains of that portion of the charge above quoted as follows:

"Give especial attention and most critical examination to the fact of the course of the bullet through the body. It stands an admitted fact in this case, gentlemen, that the bullet passed through the body horizontally, that is, on a direct, true line; say whether that can be true under the circumstances revealed in this case."

One infirmity in this portion of the charge is that it was not an admitted fact in the case that the bullet passed through the body horizontally. There was much evidence in the case, which we have not deemed it necessary here to collect, that the body may have been in a stooping posture at the time the wound was inflicted. A number of witnesses testified to the common habit of deceased in stooping down while talking, or resting, and there was medical testimony to the effect that it was impossible, in the absence of a *post mortem* examination, to testify to the course of the

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bullet through the body. It is not probable that this error will be repeated upon a new trial.

8. The eighty-third assignment of error complains of that portion of the charge of the court above copied, using this language:

"It is claimed that the motive and actuating cause of this deed on the part of the respondent was the infatuation with Mrs. Fisher, and agreement and understanding reached between him and her that he should do this deed, and thus that she might realize upon the great life insurance carried upon her husband's life."

Because of what we have said upon the subjects of the life insurance and conspiracy, further comment upon this portion of the charge is not necessary. That it was probably very damaging to the respondent is evident, in view of the course which the trial took.

Error is also assigned upon the refusal of the court to charge the jury as requested by respondent's counsel. We have examined these requests with some care, as well as the charge, and are of opinion that such of the requests as correctly stated the law upon the subject were covered by the court in its general charge. This court has uniformly held that it is not error for the trial judge to refuse to charge as requested, where the charge as given states the law applicable to the case correctly and covers all the points in such of the requests as were proper. *Fisher* v. *People,* 20 Mich. 135; *McGinnis* v. *Kempsey,* 27 Mich. 363; *Joslin* v. *Le Baron,* 44 Mich. 160 (6 N. W. 214); *People* v. *Beverly,* 108 Mich. 509-512 (66 N. W. 379); *People* v. *Sauerbier,* 173 Mich. 521 (139 N. W. 260).

Many questions are sought to be raised upon the motion for a new trial relative to the introduction of evidence, where no exceptions were taken. The consideration of these has not been had in the decision of the case, but we wish to call attention to the rule that failure to except to the admission of evidence prevents

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a review of the question on writ of error, notwithstanding a motion for a new trial on that ground. *Conger* v. *Hall*, 158 Mich. 447 (122 N. W. 1073). See, also, *McWilliams* v. *Railway Co.*, 146 Mich. 216 (109 N. W. 272).

For the reasons stated, the conviction and judgment in the court below are reversed, and a new trial granted. Respondent will be remanded to the sheriff of Lake county to be dealt with according to law.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

UNION TRUST CO. *v.* RADFORD.

1. USURY—TAXES—PAYMENT BY MORTGAGOR—TRUST COMPANY.

Defendant and his wife executed to complainant trust company a mortgage bearing interest at six per cent. and providing in addition thereto that the mortgagors should pay all taxes and assessments levied upon the lands or upon or on account of the mortgage or indebtedness secured. Complainant claimed and introduced testimony tending to prove that it paid no taxes on its mortgages, at the time the conveyance was executed, for the reason that it paid taxes on capital stock which was invested in part in mortgages, that complainant never intended to collect and had never demanded more than the lawful rate of interest. It was conceded that the combined city and county taxes had exceeded 1.8 per cent. for a considerable period of years. Under the act authorizing the incorporation of trust companies, it was provided that such company should deposit with the State treasurer not less than fifty per cent. of its capital stock in bonds

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and Michigan mortgages, that such corporation should have power to loan money on real estate and collateral security, that so much of the capital stock as must be placed on deposit might be invested in mortgages or other security upon property worth double the amount secured (2 Comp. Laws, § 6157 *et seq.*). 1 Comp. Laws, § 3824, provides that all property, real and personal, not expressly exempt from taxation, shall be subject to taxation, and section 3831 makes all shares of corporations, when the corporate property is not exempt, subject to taxation; section 3834 exempts from taxes the property of corporations that are required to pay specific taxes. *Held*, that the mortgage was taxable as a part of the capital of complainant and was therefore usurious. 2 Comp. Laws, § 4857.

2. SAME—CONTRACTS—CONSTRUCTION—MORTGAGES.

Although the question of intent is to be taken into account in determining whether a contract is usurious, parties must be deemed to have intended the result expressed by clear and unambiguous language employed in the instrument.[1]

ON REHEARING.

USURY—CAPITAL—INVESTMENTS.

Construing the statute as to usury in the light of 2 Comp. Laws, § 6168, providing that real estate of a trust company shall be taxed as other real estate where it is situated, and the residue of its capital shall be taxed as personal property, in which the word capital is not meant to include all the property of the corporation, such a purchase money mortgage as the one in question must be held to represent an investment of capital, entering into the residue upon which the trust company is liable to pay taxes, and that, therefore, complainant paid the tax on account of such mortgage so as to render the mortgagor liable to repay the amount thereof. Presumptively the mortgage represented an investment of its capital. Property that represents capital stock is the equivalent of capital stock for purposes of taxation.

Appeal from Wayne; Mandell, J. Submitted June 21, 1911. (Docket No. 12.) Decided March 12, 1912.

[1] As to the right of one to testify as to his intent, see note in 23 L. R. A. (N. S.) 391.

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Rehearing granted June 1, 1912. Former opinion affirmed June 2, 1913.

Bill by the Union Trust Company against George W. Radford and Laura F. Radford for the foreclosure of a mortgage. From a decree for complainant, defendants appeal. Reversed.

Russel, Campbell, Bulkley & Ledyard (Charles H. L'Hommedieu, of counsel), for complainant.

Thomas A. E. Weadock, for defendants.

BLAIR, J. This is an appeal by the defendants, George W. Radford and Laura F. Radford, from a decree for the foreclosure of a mortgage. This mortgage, which was on a "committee form," filled in entirely in the handwriting of defendant George W. Radford, was executed on August 21, 1901, by both defendants, to secure to the complainant the payment of a note for $1,500 in two years from its date, with interest at six per cent. per annum, and contained a clause whereby—

"The said mortgagors, within forty days after the same became due and payable, will pay all taxes and assessments which shall be levied upon the said lands, or upon, or on account of this mortgage, or the indebtedness secured hereby, or upon the interest or estate in said lands created or represented by this mortgage, or by said indebtedness, whether levied against the said mortgagors, their legal representatives or assigns, or otherwise; and said mortgagors hereby waive any and all claim or right against said mortgagee, its successors or assigns, to any payment or rebate on, or offset against, the interest or principal of said mortgage debt by reason of the payment of any of the aforesaid taxes, or assessments."

On July 18, 1906, the note and mortgage were extended as to their time of payment to August 21, 1909; all the other conditions and terms remaining the

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same, which extension was signed by the Union Trust Company and defendants Radford.

On May 6, 1909, this bill of complaint was filed, to which defendants filed an answer presenting the defense that the note and mortgage were usurious in that the interest reserved, plus the taxes on the mortgage, exceeded the legal contract rate of seven per cent.

Was the contract usurious? The circuit court answered this question in the negative, and the correctness of his conclusion presents the only question which we find it necessary to consider.

Complainant's secretary testified:

"The Union Trust Company pays no taxes upon its mortgages for the reason that under the law under which it is organized it pays on its stock. It did not pay taxes on its mortgages at the time this mortgage was made, and it has never, during the period of my relationship with the company (some 16 years), paid such taxes. It was not the intention of the Union Trust Company at the time this mortgage was made to collect a usurious rate of interest from Mr. Radford. The Union Trust Company has never made any demand on Mr. Radford to pay any taxes on the mortgage indebtedness because no such taxes were payable. [The last four answers were taken against defendant's objections on the grounds of immateriality, irrelevancy, incompetency, and calling for conclusions of the witness.] * * * The trust company, under the law of its organization, the State law, paid on its capital stock, less its showing in real estate, whatever it may be at the time. * * * It has paid large sums for taxes on its capital stock and paid taxes for its trusts. [It is conceded by complainant's counsel that the city tax rate in the city of Detroit has exceeded one per cent. since 1890, and that the officers of the Union Trust Company knew what the tax rate was upon Detroit property from year to year. It is also conceded by complainant's counsel that the combined tax rates for city and county upon Detroit property has at all times since 1890 exceeded 1.8 per cent. It is conceded by counsel for defendant that all the money loaned by the trust company upon this note

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and mortgage was used in payment for the property covered by said mortgage.]"

The position of complainant is stated in the brief as follows:

"From McMechan's testimony, which is uncontradicted by the defendants, who offered no testimony on their own behalf, it appears that, at the time this contract was made, the complainant was not assessed upon its mortgages. Section 6168 of the act under which the complainant is organized (chapter 162, 2 Comp. Laws) is as follows:

" 'The shares of stock of the corporation established under this act shall be deemed personal property, and shall be transferable only on the books of such corporations in such manner as their by-laws shall prescribe. All real estate owned by any such company may be taxed as other real estate in the city, village or township where the same may be situated, and the residue of its capital shall be taxed as personal property; but the assessment thereof for taxation shall not be at a greater rate than is assessed on money capital in the hands of individual citizens in the same city, village or township.'

"Two classes of property are by this section made assessable for taxing purposes: (1) Real estate, and (2) capital stock. By necessary inference all other property, including mortgages, is exempt. Acting under the provisions of this section, the taxing officers have always exempted the mortgages of the trust company. It is clear, then, that the officers of the complainant could not have intended by the inclusion of this printed clause in the mortgage to compel the mortgagors to pay a larger rate of interest than six per cent., because they knew that their mortgages were exempt from taxation and no charge could ever be made against them, under this clause, which they could properly ask the mortgagors to pay in addition to the reserved interest of six per cent. That this is true is further evidenced by McMechan's testimony that during all the period when the mortgage was in force no taxes were paid upon it and no charge was made against the mortgagors on that account. The fact that the tax rate at all times exceeded one per cent., and that the officers of the Union Trust Com-

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pany knew, from year to year, what the tax rate was (which was conceded by counsel for complainant), does not show any intent to exact usury, for the reason that, while the officers knew what the general tax rate was, they, at the same time, knew that it had no application to their own mortgages, which were exempt."

Section 6157, 2 Comp. Laws, provides in part:

"As soon as possible, and not later than six months, after any such company has commenced business under the provisions of this act, it shall deposit with the State treasurer of this State not less than fifty per cent. of the amount of its capital stock, nor more than two hundred thousand dollars in amount; such deposit to be in bonds and mortgages, or notes and mortgages on unincumbered real estate within the State of Michigan, worth double the amount secured thereby, or public stocks and bonds of the United States, or any State of the United States, that has not defaulted on its principal or interest within ten years, or of any organized county or township, or incorporated city or village, or school district, in this State, or in any other such State, duly authorized to be issued," etc.

By section 6164:

"Such corporation shall have power to loan money upon real estate and collateral security, and execute and issue its notes and debentures, payable at a future date, and to pledge its mortgages on real estate and other securities as security therefor."

By section 6165 the corporation may purchase, hold, and convey real estate:

"*Second.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its business.

"*Third.* Such as it shall purchase at sales under judgments, decrees or mortgages held by it, but such corporation shall not bid at any such sale a larger amount than is necessary to satisfy its debt and costs. * * * No real estate acquired in the cases contemplated in the second and third subsections above shall be reckoned as an asset for a longer time than five years."

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Section 6166 provides:

"The directors of any such corporation shall invest so much of the capital stock as is herein provided to be deposited in the State treasury, in bonds secured by mortgages, or notes and mortgages on unincumbered real estate within the State of Michigan, worth double the amount secured thereby, or in public stocks and bonds of the United States, or any State of the United States that has not defaulted on its principal or interest within ten years, or of any organized county or township, or incorporated city or village, or school district in this State, or in any other such State, duly authorized to be issued. And such board of directors may invest or loan the balance of its capital stock and other moneys received by such corporation in trust, in bonds secured by mortgages, or notes and mortgages on unincumbered real estate within the State of Michigan, worth double the amount secured thereby, or in public stocks and bonds of the United States, or any State of the United States that has not defaulted on its principal or interest within ten years; or of any organized county or township, or incorporated city or village, or school district in this State, or in any other such State, duly authorized to be issued, or in such real or personal securities as they may deem proper."

Section 6176 provides:

"Whenever it shall appear from the report of any such corporation, or the commissioner shall have reason to believe that the capital of any company is impaired or reduced below the amount required by law, it shall be the duty of the commissioner and he shall have power to examine said company and ascertain the facts, and in case he finds such impairment or reduction of capital to require such company to make good the deficiency so appearing or found to exist."

Section 3824, 1 Comp. Laws, provides:

"That all property, real and personal, within the jurisdiction of this State, not expressly exempted, shall be subject to taxation."

Section 3831, subds. 6, 7, and 13, provides that, for the purposes of taxation, personal property shall in-

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clude (subdivision 6) "all credits of every kind," etc.; (subdivision 7)—

"All shares in corporations organized under the laws of this State, when the property of such corporations is not exempt, or is not taxable to itself, or when the personal property is not taxed;" (subdivision 13) "all other personal property not herein enumerated, and not especially exempted by law."

Section 3834 provides:

"The property of corporations paying specific taxes shall be exempt, as to the property, covered by such taxation, except when otherwise provided by law. All other property of such corporations shall be taxed under this act."

No statute has been called to our attention, nor have we been able to find any, exempting any part of complainant's property from taxation, unless, as contended by complainant, section 6168 brings about such result by necessary inference.

While the terms "capital" and "capital stock" are often, and perhaps generally, used interchangeably (by some courts held to designate the nominal capital stock of the corporation, and by others to mean the property which the company owns), we are satisfied that in the section under consideration the word "capital" was used to signify all of the property owned by the corporation, both real and personal, within the meaning of the taxing laws. The terms of the incorporating statute, read in connection with the general tax law, appear to us to compel this conclusion.

The corporation's securities are treated in the sections quoted as part of the capital stock and as such are deposited with the State treasurer. The real estate purchased or acquired by foreclosure is treated as part of the capital stock to be taxed as other real estate is taxed generally; and the "residue of its capital" (that is, the portion of its capital left after deducting its real estate capital) is to be taxed as personal prop-

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erty is generally taxed, at its "true cash value." We hold, therefore, that the mortgage was taxable as part of the capital of the complainant. *People* v. *Roberts*, 154 N. Y. 1 (47 N. E. 974); *Excelsior Water & Mining Co.* v. *Pierce*, 90 Cal. 131 (27 Pac. 44); *Security Co.* v. *Town of Hartford*, 61 Conn. 89, 101 (23 Atl. 699); 2 Beach on Private Corporations, § 465; *Wells* v. *Canal Co.*, 90 Wis. 442 (64 N. W. 69); *Citizens' Street Ry. Co.* v. *Common Council*, 125 Mich. 673 (85 N. W. 96, 86 N. W. 809, 84 Am. St. Rep. 589); *Stroh* v. *City of Detroit*, 131 Mich. 109 (90 N. W. 1029). But, even assuming that the term "capital" is synonymous with "capital stock" in the most restricted sense, still the complainant's mortgages represented capital stock and were indirectly taxed as part of the capital stock. *Bank Tax Cases*, 2 Wall. (U. S.) 200, 210; *Tennessee* v. *Whitworth*, 117 U. S. 139 (6 Sup. Ct. 649); *Atlantic, etc., R. Co.* v. *Allen*, 15 Fla. 637, 660; *Connersville* v. *Bank*, 16 Ind. 105.

The real estate in which the money capital was invested by the company constituted part of its capital subject to taxation; the securities in which the money capital was invested constituted a part of the residue of its capital. It is further to be observed that, in case of a transfer of the note and mortgage, the purchaser thereof would be entitled to enforce payment in accordance with the terms of the contract, except for the statute.

It is true, as contended by counsel for complainant, that the question of intent is to be considered in determining whether or not a contract is usurious; but where, as in this case, the contract is unambiguous and its legal meaning clear, the parties must be deemed to have intended the result expressed by the contract. *Rosen* v. *Rosen*, 159 Mich. 72 (123 N. W. 559, 134 Am. St. Rep. 712). We therefore hold that the contract was usurious. *Green* v. *Grant*, 134 Mich. 462 (96 N.

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W. 583); *Estey* v. *Loan Ass'n*, 131 Mich. 502 (91 N. W. 753); *Stack* v. *Cedar Co.*, 151 Mich. 21 (114 N. W. 876, 16 L. R. A. [N. S.] 616, 14 Am. & Eng. Ann. Cas. 112); *Rosen* v. *Rosen, supra.*

It follows that at the time the bill was filed the contract had not matured and the bill was therefore prematurely filed.

A decree will be entered dismissing the bill, with costs of both courts to defendants.

ON REHEARING.

Russel, Campbell, Bulkley & Ledyard (Henry M. Campbell and *Henry Ledyard,* of counsel), for complainant.

Butterfield & Keeney, amici curiæ, for Michigan Trust Co.

George W. Radford, in pro. per.

OSTRANDER, J. Upon the application of complainant, the cause has been reargued and the principal question involved has again been considered. A reference to our former opinion will make any preliminary statement of facts unnecessary. The statute, the application and enforcement of which is demanded by the defendants (appellants) is 2 Comp. Laws, § 4857, which reads:

"No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract, whereby or whereon a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon."

The contract in suit reserves annual interest at the

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rate of 6 per cent. The covenant in the mortgage, recited in the former opinion, obligates the mortgagors to pay taxes "which shall be levied upon the said lands or upon, or on account of this mortgage, or the indebtedness secured hereby, * * * whether levied against said mortgagors * * * or otherwise."

It is the contention of defendants (appellants) (an affirmative defense set up in their answer) that it is made to appear upon this record that an illegal rate of interest is reserved. The case has an interest compared with which the amount actually at stake is inconsiderable. It involves, as our former opinion shows, an examination of the law under which complainant is organized in connection with general laws governing the taxation of personal property. We are required to determine whether, under the law, a tax was, or ought to have been, levied upon or on account of the mortgage in suit. While maintaining the position which it originally assumed, complainant, upon the rehearing, has presented other considerations opposed to the conclusion stated in the former opinion, which, it is contended, should control the decision.

The law under which complainant is organized provides that real estate owned by it shall be taxed as other real estate in the place where it is situated, "and the residue of its capital shall be taxed as personal property. * * * " 2 Comp. Laws, § 6168.

Appellee contends that upon no proper construction of the law (the law just referred to and the general tax law) can it be held that any particular mortgage owned by it is taxable as a mortgage; that no tax can be levied upon or on account of a mortgage as such, when the mortgage is held by a trust company or, for that matter, by a bank. The argument is that the capital (and surplus) of such an institution is, at least when the capital is not impaired, the difference between its resources and its liabilities, and, after de-

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ducting from this difference the value of real estate, what remains is the residue of its capital which, as such residue, is taxed as personal property. It is admitted that the particular mortgage, and all mortgages owned by it, must be taken into account in determining the amount of its assets, and consequently in fixing the tax to be levied, but that it would be a strained construction of the mortgagor's covenant to say a tax upon said residue of capital was levied upon or on account of the mortgage.

It is apparent that a trust company may own (have title to and possession of) property and credits greatly in excess of its capital and surplus, and exclusive of property which it holds in trust for others. The resources of such an institution are not necessarily or usually equal to the capital and surplus. Such companies are required (section 6170) to make reports to the commissioner of the banking department, upon forms prescribed and furnished by him, which shall exhibit in detail the resources, assets, and liabilities; the said reports to be published in a newspaper. If a dividend is declared, it must also be reported, together with any amount carried to surplus fund and the amount of net earnings in excess thereof. From these and other provisions of the statute, as well as from common knowledge, it is apparent that the word "capital," as employed in the statute in section 6168, does not necessarily mean all the property owned by the corporation. The law under which complainant is organized does not contemplate the listing and taxation of particular items of personal property in which its capital may be invested. Whether capital is impaired may be, and usually is, determined by a comparison of resources with liabilities; and capital, within the meaning of 2 Comp. Laws, § 6168, may be treated as meaning the difference between resources and liabilities, and will include increment usually designated as surplus and undivided profits.

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But we must go further before the question in issue can be decided. Either the statute contemplates that the capital and surplus, after deducting the value of real estate, shall be taxed as capital, however invested, and whether invested or not, or else it is important to know, for purposes of taxation, how the capital and surplus is invested. Suppose, for example, that in a particular case it is claimed that a part of the capital of a trust company is invested in bonds of the United States, or in other tax-exempt securities. Suppose that such a concern selects from its resources securities which are exempt from taxation and presents them to the assessing officer as representing the residue of capital and surplus. It is obvious that for the purposes of taxation there is a difference between determining by a comparison of resources and liabilities the sum of the capital and surplus and determining the actual investments of capital in securities and other property. An actual case may be presented. In *Union Trust Co.* v. *Detroit Common Council*, 170 Mich. 692 (137 N. W. 122), it appeared that the complainant sought to have deducted, from the sum of its apparent residue of capital, surplus, and undivided profits, more than a half million dollars represented by mortgages upon which it had paid to the county treasurer the specific tax under the provisions of Act No. 91, Pub. Acts 1911. It sought to set off against its capital, for purposes of assessment, further sums represented by stocks in other Michigan corporations which it owned. Its contention was allowed. That contention necessarily admitted that the items, the particular securities in which its capital was invested, affected the amount for which its capital should be assessed. The statute treats real estate owned by complainant as an investment of capital. It requires a particular investment of capital in securities to be deposited with the State treasurer. The residue may be variously invested or, at a particular time, may not be invested

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at all but be in the form of money. It ought not to be considered at a particular moment as invested in particular securities for one purpose and not so invested for all purposes. And, however invested at a particular time, this residue of capital is equal to the sum of the securities in which it is invested. The amount of the tax upon each item (each dollar) of security is determinable.

Presumptively the mortgage in question represented an investment of complainant's capital. It was a purchase-money mortgage, given upon the sale by it of its real estate. It entered into the residue of its capital, upon which residue it was taxed at a rate exceeding one per cent. Complainant was therefore liable to pay, and did pay, the tax on account of the mortgage, and the covenant of the mortgagor required him to repay the tax. The expression in the former opinion that in 2 Comp. Laws, § 6168, the word "capital" "was used to signify all of the property owned by the corporation, both real and personal, within the meaning of the taxing laws," was perhaps misleading. It was intended to mean no more and no less than has just been stated, namely, that whatever property represents capital stock is the equivalent of capital stock for purposes of taxation. We are impressed that the second reason given in the opinion for declaring the contract usurious, namely, that it might be transferred to another, in whose hands it necessarily would be taxable, and who might enforce the repayment of the tax by the mortgagor, is unsound. It could not be known in what jurisdiction the purchaser would reside nor the rate of taxation the mortgage would bear.

But with the conclusion that the contract in question is usurious, and that the bill must be dismissed we feel compelled to agree.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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BISSELL *v.* FORD.

1. ADJOINING LANDOWNERS—EXCAVATION—LATERAL SUPPORT.
   In excavating near the boundary line of his premises, a proprietor must take reasonable precautions to prevent the falling of adjacent property, because of the removal of lateral support.[1]

2. SAME.
   He is liable for injury to the real estate even if he takes precautions such as are necessary and reasonable, but is not liable for damages caused to any superstructure.

3. SAME.
   If the pressure of the superstructure causes the land to fall, no liability arises from damages to either, but if he fails to take such reasonable precautions to protect his neighbor's realty and preserve it in a natural state, one who removes the lateral support is liable for injury to both land and buildings if the negligence was the proximate cause of the fall, and not the pressure or weight of the building.

4. SAME—EXCAVATION—LATERAL SUPPORT—NEGLIGENCE.
   It was a question of fact for the jury in a suit by the owner of a building for damage caused by excavating on adjoining premises, whether defendant's contractor exercised reasonable care in causing several caissons to be sunk from 65 to 114 feet, removing 45 per cent. of the soil in the belt included by the pits, which were across a 20-foot alley from the injured structure, and in leaving the openings exposed for several weeks; testimony of experts being offered to show that the method pursued was improper.

5. SAME—BUILDING AND CONSTRUCTION—NEGLIGENCE.
   Whether due care was used in ascertaining the character of the soil through which the excavation was required to extend, in order to protect an adjacent office building, was also a question of fact upon testimony showing that

[1] As to the liability for removal of lateral or subjacent support of land in its natural condition, see note in 68 L. R. A. 673. And upon the liability for injuries to buildings on adjoining land by negligent removal of lateral support of soil, see note in 6 L. R. A. (N. S.) 243.

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a proper and careful exploration would have disclosed that a body of salt water lay between the surface and bed rock, rendering the sinking of caissons to the rock impracticable.

6. SAME—DUE CARE.

Defendants could not be required to have on hand equipment sufficient to care for the large body of water which they unexpectedly encountered at a depth of 90 to 115 feet, as that would be to demand extraordinary precautions, but the jury was rightly permitted to say whether a reasonable effort was made to dispose of the water after it appeared.

7. SAME—MASTER AND SERVANT.

For injury done by the negligence of a contractor working independently of the owner's control, he would not be held responsible unless the work was inherently dangerous.[1]

8. MASTER AND SERVANT.

Under a construction contract which provided that the architect and his assistants should have free access to the work, that the contractor should commence and cease from operations when directed by the architect in case the work was insufficiently or insecurely done, that the owner might at any time make alterations in the plans, and the architect might determine at all times how many men should be employed continuously, and that in case of the failure of the contractor to furnish materials and perform labor according to the contract the owner might take the work into his own charge, supervision and control of the work upon the foundation was so reserved in the proprietor as to charge him for injury caused to an adjoining building by negligent sinking of caissons and removal of sufficient lateral support.

9. ADJOINING LANDOWNERS—REAL PROPERTY—EVIDENCE.

Evidence that the pressure of soil on the lagging or supports in certain pits caused the supports to bulge in the

[1] The authorities on the question of the liability of employer for injury by independent contractor to lateral support are treated in a note in 65 L. R. A. 849. And for general rule as to absence of liability of master for acts of independent contractor, see note in 65 L. R. A. 622. And on the question who is an independent contractor, see notes in 65 L. R. A. 447 and 17 L. R. A. (N. S.) 371.

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direction in which the slipping or movement occurred was competent; also, testimony should not have been excluded that some space was necessarily left between the earth and lagging.

10. SAME—EVIDENCE.

While testimony of experts that, even with employment of a high degree of care, adjoining buildings are more or less affected, was properly received, the court erred in receiving evidence that in specific instances similar difficulties were encountered in constructing buildings specifically referred to.

11. SAME—DAMAGES—INJURY TO OFFICE BUILDING.

Damages might properly be based on the rentals or receipts from the building that stood on the premises affected by the defendant's negligent excavation, regardless of the worth of the real estate for other purposes.

12. DAMAGES.

When one has been injured in his property by the wrongful act of another, the claim for compensation cannot be successfully met by showing that if the injured property were devoted to other uses, the damage would be diminished.

Error to Wayne; Mandell, J. Submitted April 19, 1911. (Docket No. 50.) Decided June 2, 1913. Rehearing denied January 5, 1914.

Case by Blanche W. Bissell and others against Edward Ford and others for damages to an office building. Judgment for defendants. Plaintiffs bring error. Reversed.

H. E. Spalding and *Walker & Spalding (Harrison Geer,* of counsel), for appellants.

Stevenson, Carpenter & Butzel (William L. Carpenter, of counsel), for appellee Ford.

C. K. Latham and *William C. Stuart,* for appellee Goddard.

Choate & Webster, for appellee Vaughan.

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BIRD, J. The plaintiffs are the owners of the Moffat building, which is six stories in height, situate on the southwest corner of Fort and Griswold streets, in the city of Detroit. Defendant Ford is the owner of the Ford building, which is located immediately south of the Moffat building; a 20-foot alley intervening. Each building has a frontage on Griswold street of 138 feet and upwards of 100 feet on the alley. The Ford building is an 18-story office building, and its construction was begun in August, 1906, with defendant Goddard as principal contractor. The building stands on 47 concrete piers, and the work of excavating for and construction of these piers was sublet by Goddard to defendants Vaughan and Dumont. The principal question in the case grows out of the manner in which the defendants Vaughan and Dumont did their work. Before beginning their work 11 borings were made at different locations on the premises, with a 2½-inch auger, to the depth of from 65 to 70 feet, and they disclosed a clay soil of varying degrees of consistency, with occasional streaks of sand. Vaughan and Dumont started the work on September 18, 1906, intending to put the caisson pits for the piers down to bed rock, a depth of approximately 120 feet, but at the depth of 95 feet they encountered a large body of sulphur water, which rendered it impracticable to go that far without increasing materially the cost of construction. It was therefore decided to go no farther than the 95-foot level and to fill the pits that were already below that level up to the 95-foot level. To compensate in part for not going to bed rock, the resisting power of the piers was increased by enlarging them at stated depths into bell-shaped formations. In pursuance of this plan, seven pits were sunk at the same time along, adjoining, and projecting into the alley. The five easterly ones were from 6 to 6½ feet in diameter and were sunk to a depth of between 114 and 115 feet.

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The two westerly ones were 8 feet in diameter and were about 60 feet deep. Before these were completed, 8 pits along the Griswold street line were commenced. In excavating for the 7 pits along the alley, 45 per cent. of the soil within the belt in which they lay was removed. About a month was consumed in excavating the pits to the depths stated, and on October 20th water came into some of them, and on the next day it broke into one of the deeper ones in great volume and from there communicated to the others. The presence of the water in the pits caused all work to be suspended, and a considerable delay followed. The lack of adequate pumping machinery contributed to the delay. The work of pumping out the pits and filling them with concrete was begun on November 7th, and concluded on February 16, 1907. A few days before the water broke into the pits, it was observed that the alley side of the Moffat building commenced to settle, and it continued to settle until and after the pits were all filled; the maximum settlement of the wall next to the alley being 5⅞ inches, and the lateral movement toward the alley being about 2 inches. The maximum settlement in the alley was 6¼ inches. This resulted in considerable damage to the Moffat building, causing its walls to crack and to materially lessen the life of the building. The cost of repairs was shown to be $23,000, and the permanent injury to the building was estimated at $75,000. It was for the recovery of these damages that this action on the case was commenced.

The right to recover is based upon the negligence of the defendants in the construction of the foundations. The several items thereof being stated as follows:

"*(a)* In failing to ascertain, before adopting the plan of construction, the character of the soil on the site of the Ford building and the presence therein of

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a body of water such as would make the execution of that plan impracticable.

"*(b)* In sinking at the outset and at one time a line of pits in a part of their site where soil movement and seepage would be most likely to be caused.

"*(c)* In failing to adopt and use proper methods and adequate appliances in freeing the pits from water after they were flooded.

"*(d)* The neglect of a preliminary investigation to ascertain what lay between the surface and bed rock."

At the conclusion of plaintiffs' case, the trial court was of the opinion that no case had been made for the consideration of a jury, and accordingly directed a verdict for the defendants. The question as to whether the trial court was right in so doing is the principal question before us on review.

The question of the relative rights and obligations of adjacent landowners with reference to the lands in a natural state, and also with reference to making excavations and improvements thereon, was much discussed and considered in the case of *Gildersleeve* v. *Hammond,* 109 Mich. 431 (67 N. W. 519, 33 L. R. A. 46), and as a result thereof certain rules were therein laid down which were intended to serve as a guide and help in settling future controversies of that character. They are:

(1) While a landowner has the undoubted right to excavate close to the boundary line, he must take reasonable precautions to prevent his neighbor's soil from falling.

(2) If he has taken such reasonable precautions, and yet the soil falls from its own pressure, he is still liable for injury to the land, but not for any injury to the superstructure.

(3) If the pressure of the superstructure causes the land to fall, he is not liable either for injury to the land or superstructure.

(4) If he fails to take such reasonable precautions

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to protect his neighbor's soil, and to preserve it in its natural state, he is liable for the injury to both the land and the superstructure, if the pressure of the superstructure did not cause the land to fall, and it fell in consequence of the failure to take such reasonable precautions.

The negligence complained of in the declaration brings the case within the last one of these rules. Viewing the situation through these rules, it is clear that the defendant Ford had a right to excavate to the depth which he did to secure his foundations, and, if in so doing due regard was had for the premises of his neighbors on the north, there can be no recovery in this case, even though there was a lateral movement of the soil, because no claim is made in the declaration for injury to the land. On the other hand, if the method adopted and followed was one which lacked skill and ordinary care, then he would be liable for the damages which ensued.

It is pointed out that the plan was lacking in skill and ordinary care in that seven caisson pits were sunk parallel with the alley at nearly one and the same time, to a depth varying from 65 to 114 feet, thereby removing 45 per cent. of the soil in the belt in which they were constructed next to and projecting into the alley, and that this exposure continued for several weeks. Engineers who were familiar with caisson foundation work testified that the method pursued was an improper one and that the proper way would have been to open the lines of caisson pits at right angles to instead of parallel with the Moffat building and to fill them with concrete as soon as they were sunk and to permit no more than one pit at a time to be open next to the alley. This ground of negligence was, under the testimony, a question of fact and should have been submitted to the jury.

Another ground of negligence is that, if it were

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intended to go to bed rock, it should have been determined in advance what the character of the soil was which lay between the surface and the rock, and it is argued that subsequent events showed that, had this been done, the body of salt water which overlay the rock would have been discovered and the trouble which followed would have been in a measure obviated. This question was likewise the subject of expert testimony. That testimony suggested that in beginning the work one pit should have been put down to bed rock. This would have disclosed conditions between the surface and the rock and would have furnished a guide in sinking those that followed. In the construction of the modern skyscraper, which requires the foundations to be put down to such great depths, a due regard for the adjacent premises ought to make it incumbent upon those sinking them to use reasonable diligence to ascertain in advance the character of the soil through which it is intended to go.

The third item of neglect is the failure of defendants to adopt proper methods and adequate appliances to free the pits from water. To require defendants to have at hand equipment which would take care of as large a body of water as was encountered would be to hold that it was necessary for them to take extraordinary precautions; this they were not bound to do. Washburn's Easements & Servitudes (4th Ed.), [§ 439] p. 592. As to whether a reasonable effort in that direction was made after the presence of the water became known was one of fact, depending upon the great exposure of the lateral support and the ease with which adequate appliances could be supplied.

It is argued that, whatever injury resulted on account of seepage, no recovery can be had therefor, and that, as the testimony does not point out how much of the injury was due to the "too near digging" and how much to "seepage," the jury had no data upon

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which a verdict could be based. The plaintiffs were entitled to the use and enjoyment of their land, protected by the lateral support of defendants' land. If that support was negligently removed and the adjacent premises were injured in consequence of it, of what importance is it that the lateral support was composed of one kind of soil rather than another? Whether the lateral support was composed of a rocky formation, a clay soil, a sandy soil, or a peat soil, or any admixture of these, and whether there was much or little moisture in it, the plaintiffs were entitled to its protective support, whatever it was. The kind of soil it was might be important in determining the amount of care required in removing it, because the care in removing must be commensurate with its cohesiveness and mobility. It must be borne in mind that the complaint made in this suit is that the lateral support was withdrawn in such a negligent manner that plaintiffs' land moved downward and outward and injury resulted. The plaintiffs do not deny the right to remove the soil to the depth it became necessary, but they complain of the manner in which it was done, and stake their case upon the proposition that all that was done might have been accomplished by the use of reasonable care, with no additional cost and without injury to them. If there were two ways in which defendant Ford could make the desired improvements on his land, one of which, with the use of reasonable care and skill, would not injure plaintiffs' premises, and another method which lacked skill and care, which would result in injury to them, it was clearly his duty to select the former. Whether he has done so was a question of fact. An examination of the testimony bearing upon this phase of the case has persuaded us that the questions whether there was a lateral soil movement, and, if so, whether it was occasioned by the failure of defendants to exercise reasonable care and

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skill in putting down the foundations, and whether such soil movement would have taken place had not the building been situate thereon were all questions of fact for the consideration of the jury.

Much importance has been placed upon the cases of *Popplewell* v. *Hodgkinson*, 4 L. R. (Exch.) 248, *Frazier* v. *Brown*, 12 Ohio St. 294, and *New York, etc., Filtration Co.* v. *Jones*, 37 App. D. C. 511 (37 L. R. A. [N. S.] 193), as supporting the proposition that no recovery can be had for injuries resulting from seepage. In all of these cases complaint was made because of the doing of an act, viz., the withdrawing and diverting of subterranean waters to the injury of plaintiffs' premises. It was the doing of the act rather than the manner of doing it that caused the complaint. The right to do the act was denied. In the case at bar the right to do the act, namely, the putting down of the foundations to such great depth, is not denied, but the thing complained of is the negligent manner in which the act was done, and it is insisted by the plaintiffs that all that defendants accomplished might have been accomplished without injury to them, if the defendants had done the act with reasonable care and skill. Therein lies, in my opinion, the inapplicability of those cases to the facts disclosed by this record.

The further question is presented whether Goddard and Vaughan and Dumont, in doing the work, were independent contractors in the sense that defendant Ford would be relieved of liability for their negligence. This question must be determined from the contracts of the parties. The rule in such cases is well stated in *Atlanta, etc., Co.* v. *Kimberly*, 87 Ga. 161 (13 S. E. 277, 27 Am. St. Rep. 231), where it is said that:

"Where an individual or corporation contracts with another individual or corporation exercising an independent employment, for the latter to do a work not in itself unlawful or attended with danger to others,

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such work to be done according to the contractor's own methods, and not subject to the employer's control or orders except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the contractor's servants."

The opinion then proceeds to point out several exceptions to this rule, one of which is as follows:

"The employer may also make himself liable 'by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of the work, or of some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference.'"

The rule laid down in the foregoing is in accord with *Wright* v. *Manufacturing Co.*, 124 Mich. 91 (82 N. W. 829, 50 L. R. A. 495); *Larsen* v. *Telephone Co.*, 164 Mich. 295 (129 N. W. 894); *Ripley* v. *Priest*, 169 Mich. 383 (135 N. W. 258). Some of the stipulations of the contract which bear upon the extent to which the right was reserved by defendant Ford to direct and control the work are:

(a) The architect and his assistants shall at all times have free access to the work.

(b) The contractor shall enter upon the work when directed by the architect.

(c) The contractor shall cease work on any part of it which in his opinion will result in insecure or unsafe construction and shall not thereafter proceed with it until notified by the architect what to do and when to proceed.

(d) The owner may, at any time during the progress of the work, make alterations in plans, material, or workmanship, with proper allowance for extra expense, etc.

(e) The architect may direct how many men shall be continuously employed.

(f) In case of failure of contractor to furnish

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materials, perform labor, etc., the owner is given the right to take the work into his own hands and complete it at the expense of the contractor.

(g) The contractor shall do all excavating for all basements, areas, caissons, etc., and shall remove from the premises all earth and debris, as directed by the architect.

(h) The contractor shall do all bailing and draining of caisson wells, trenches, and basement surfaces, which may be necessary during the progress of the work, using the best means of accomplishing the same, as directed by the architect.

(i) The contractor shall build caisson foundations as shown on both the engineering and architect's drawings, digging to be thoroughly braced and protected until concrete piers are complete; jacks and drums to be used where necessary. Shafts to be kept straight and plumb and carried down to bed rock. This, contractor shall estimate on a basis of depth.

(j) The contractor shall estimate on a basis of depth of 120 feet below grade line to bed rock and shall give a price per foot for additions to or deductions from this depth. As the excavations progress the sides of walls are to be cased with wood lagging, held in place by means of adjustable steel rings.

After specifying the method of construction and of filling the caissons, the contract then provides that:

"The entire work being executed in such a manner as to be acceptable to the architects in every respect."

It is apparent from these provisions that the defendant Ford reserved the right, through the architects, of a supervisory control of the building operations. It is not the case of making the architect the judge as to whether the work has been executed in accordance with the plans and specifications, but the right reserved goes further and reserves to him the right to partially control the work; to say how and when it

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shall be done; to dictate the number of employees which shall be continuously employed; the right to take the work into his own hands in certain contingencies; and provides for an exercise of discretion by the architects as to the work during its progress. The right reserved is broad enough to permit the architects to dictate the manner and order of putting down the caissons.

Several errors are assigned because of the action of the trial court in the admission and rejection of testimony. As these questions will likely arise again on a retrial, they will be considered.

The witness Meier was asked on direct examination whether he ever saw in any of the caisson pits anything indicating that the soil was moving, and answered:

"That he did and that what he saw was on November 7, 1906, in the third pit south from the alley on Griswold street, and that what he saw was a strong bulging in the lagging on the northeast side of that caisson at an estimated depth of 60 feet below the street level; that the amount of bulging seemed to be about four inches (that is, that the lagging was swelled in or pressed in about four inches); and that a light was dropped either by the foreman or the clerk in order that he might see the bulge."

This testimony was, upon defendants' motion, stricken out because the caisson pit in which the observation was made was too far removed from the alley, and because there was no proof that the bulging was caused by the pressure of the earth.

Plaintiffs also offered to show, by expert testimony in connection with this question, that it was impracticable to put down caisson pits without leaving more or less space between the lagging and the earth. It was the contention of plaintiffs that the lateral movement of the Moffat building was caused by a movement of the soil under it to the south and toward the

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caisson pits, and that the pressure of the soil against the lagging was evidence that the soil did move southward. It was a circumstance tending to support that contention, and the fact that such evidence was not conclusive of the question, and that there were other ways to show such movement did not necessarily render the proffered testimony incompetent. We think it should have been received. And we are also of the opinion that the testimony offered by the experts was admissible. If it were true that it is impracticable to put in lagging without leaving voids back of them, and on the occasion in question it was observed that the voids were filled and that there was a bulge in the lagging, it would be some evidence that an outside pressure was moving toward them.

The same witness upon cross-examination was asked:

"*Q.* Is it not a frequent occurrence where the best kind of care is used that adjoining buildings will be affected more or less? (Objected to as immaterial. Objection was overruled and an exception allowed the plaintiffs.)

"*A.* It does occur; yes, sir.

"*Q.* Didn't it occur in the case of the Hammond building with the same sort of soil that there was here under the Ford building? (Plaintiffs' counsel again objected, saying that every case must stand or fall on its own facts, and that we are not trying that case. That the Union Trust building was erected by driving piles, the Ford building upon caissons, and that the two methods were not comparable."

The first question does not appear to be objectionable, but the second one does. An inquiry of one who is skilled in such business as to the general effect the construction of a building of this character usually has upon neighboring buildings would not seem to be improper, whereas an inquiry which called for specific injuries to a particular building would lead so far into

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the field of collateral questions that it would be objectionable.

On the cross-examination of Mr. Clark, manager of the Moffat building for plaintiffs, it appeared that the net rental of the Moffat building in the years 1907, 1908, and 1909 was between $16,000 and $17,000 a year. He was then asked whether the site could not be leased with the building off for at least $25,000 a year net. The trial court permitted the question to be answered over the objection of plaintiffs that it was immaterial and incompetent.

When one has been injured in his property by the wrongful act of another, the claim for compensation for such wrongful act cannot be successfully met by showing that, if the injured property were devoted to other uses, the damages would be thereby lessened. The use which is being made of the property at the time the injury occurs is a proper basis for estimating the damages. The objection should have been sustained.

The judgment of the trial court is reversed, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, and OSTRANDER, JJ., concurred. BROOKE, J., did not sit.

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FOILES v. MICHIGAN COMMERCIAL INSURANCE CO.

Error to Houghton; Streeter, J. Submitted November 18, 1912. (Docket No. 81.) Decided June 2, 1913.

Assumpsit by Ella Foiles against the Michigan Commercial Insurance Company, on a policy of fire insurance. Judgment for plaintiff, and defendant brings error. Affirmed.

Hanchette & Lawton (Harry E. Hooker, of counsel), for appellant.

Burritt & Burritt, for appellee.

MOORE, J. This case involves the same principles that were involved in *Foiles* v. *Insurance Co.,* 175 Mich. 716 (141 N. W. 879), in which an opinion was handed down, and is controlled by it.

The judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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NORTHERN ASSURANCE CO. OF MICHIGAN *v.* COMMON COUNCIL OF CITY OF DETROIT.

TAXATION—INSURANCE COMPANIES—ASSETS—STATUTES.

In determining the amount of property liable to taxation, in the case of insurance corporations claiming deductions by reason of exempt bonds or property, and mortgages on which the company has paid a specific tax, the report of the State insurance commissioner, showing the balance subject to assessment, is not conclusive under Act No. 235, Pub. Acts 1903. If it is ascertained that such balance consists in whole or in part of tax exempt securities, the amount of the same should be deducted. The determination of the board of assessors, refusing to deduct mortgages of such corporation on which it has paid the specific tax under Act No. 91, Pub. Acts 1911, was rightly reversed, on mandamus, in the circuit court.

Certiorari to Wayne; Hosmer, J. Submitted January 21, 1913. (Calendar No. 25,400.) Decided June 2, 1913.

Mandamus by the Northern Assurance Company of Michigan against the common council of the city of Detroit to compel respondents to strike relator's assessment from the tax rolls. An order granting the prayer of relator's petition is reviewed by respondents on writ of certiorari. Affirmed.

Walter Barlow (Richard I. Lawson, of counsel), for appellants.

Fred H. Aldrich (Watson, Safford & Shepherd, of counsel), for appellee.

BIRD, J. The relator seeks by this proceeding to compel the respondents to strike from the tax rolls

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of the city of Detroit for the year 1912 certain real estate mortgages of the value of $55,450, upon which it claims to have paid the specific tax under Act No. 91 of the Public Acts of 1911. The relator is a domestic insurance company, and the statutory directions for ascertaining its personal property assessment is as follows:

"In computing the taxable property of insurance companies organized under the laws of this State, the value of the real property on which a company pays taxes shall be deducted from its net assets above liabilities, as determined and shown by the last report of the commissioner of insurance, including in such liabilities the legal reserve required by the laws of this State, or the regulations of the insurance department, and the remainder shall be the personal property for which the company shall be assessed." Act No. 235, Pub. Acts 1903.

In compliance with the statute, the board of assessors ascertained from the last report of the insurance commissioner that the total assets of relator were $401,486. From this sum they deducted liabilities amounting to $286,217 and the further item of $59,812 invested in tax exempt municipal bonds, leaving a balance of $55,450 as its personal property assessment. The relator then exhibited to the board certain real estate mortgages whose aggregate value exceeded its assessment and requested that its assessment of $55,450 be stricken from the rolls. This request was denied. Application was then made to the circuit court for a writ of mandamus to compel such action, and it was granted. Respondents now ask us to set aside the order of the circuit court on the grounds: (1) That the report of the insurance commissioner does not show that relator has paid the specific tax on $55,450; (2) that the board of assessors, having determined the assessment from the commissioner's

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report, its determination is final. In brief, the argument of respondents is that no deduction can be made from the assessment so ascertained by them on account of exempt property unless it is shown upon the face of the commissioner's report that it is exempt.

We think a reasonable construction of the statute is that it provides a rule to be followed by assessing officers in determining what part of the assets of an insurance company is liable to taxation. And after this rule has been followed in a given case and the personal property assessment ascertained, the mandate of the statute has been complied with, and it then becomes the duty of the assessing officers, acting under their general powers as assessing officers, to determine what portion, if any, of such assessment is exempt by law from taxation, and, when it is ascertained that the assessment includes securities exempt by law, the deduction should be made. *Union Trust Co.* v. *Detroit Common Council,* 170 Mich. 692 (137 N. W. 122).

The contention that the report of the insurance commissioner is conclusive on the question of exempt property would be more persuasive had the legislature made it the duty of the commissioner to determine what portion of the company's assets were exempt and furnished him some basis for making the determination by requiring the companies to include in their reports to him the information as to what portion of their securities were exempt from taxation.

The respondents, in support of their contention, cite the case of *Detroit Fire & Marine Ins. Co.* v. *Hartz,* 132 Mich. 518 (94 N. W. 7). An effort was made by the insurance company in that proceeding to have certain bonds exempt under the laws of the United States deducted from its assessment. This court refused to order the deduction, but its refusal to do so was placed

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upon grounds other than those which would sustain respondents' argument in this case.

We are of the opinion that the circuit court reached the proper conclusion, and its order will be affirmed. No costs will be allowed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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JUNE TERM, 1913.

LONGENECKER *v.* GRAHAM.

1. DEEDS—INSANE PERSONS—COMPETENCY—UNDUE INFLUENCE.
   Evidence considered and *held*, to sustain the finding of the circuit court that complainant executed a certain deed by reason of undue influence and mental incapacity.

2. SAME—RATIFICATION.
   Held, also, that a contract ratifying the instrument made while the probate court had jurisdiction of a petition to adjudge the grantor incompetent, did not validate the deed, where a guardian was later appointed and continued to act until discharged by order of the probate court.[1]

Appeal from Kalamazoo; Knappen, J. Submitted April 15, 1912. (Docket No. 82.) Decided July 9, 1913.

Bill by Margaret Longenecker and others against Sarah E. Graham and others to set aside a deed. From a decree for complainants, defendants appeal. Affirmed.

James M. Powers, for complainants.

Stewart & Jacobs, for defendants.

MOORE, J. Abraham Longenecker, the husband of the complainant, Margaret Longenecker, and father of the other complainants and of the defendants Sarah

[1] As to the validity of a deed by an incompetent person, see note in 19 L. R. A. 489. And on the question whether a deed of real property executed by an incompetent not judicially declared such may be avoided in action at law, see note in 19 L. R. A. (N. S.) 461.

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E. Graham and Mary Smith, died December 11, 1899. All of the parties to this litigation were of full age at the time of his death. Prior to his death Mr. Longenecker was the owner of 240 acres of land. A few weeks before his death he made arrangements to divide his property among his children by giving to each 40 acres of land, with the exception of his daughter Mary Smith, to whom he gave $1,500 in cash in place of land. In attempting to carry out such arrangements, Abraham Longenecker on the 8th day of November, 1899, employed Mr. E. W. Wilcox to prepare deeds of all of his land, subject to a life estate in Margaret Longenecker, and he also made arrangements to have $1,500 paid to his daughter Mary Smith. In making these deeds Mr. Wilcox made a mistake in the description of the land in the deed to Benjamin S. Longenecker and Clara Snell, so that, instead of conveying all of his land, Mr. Longenecker left 40 acres not conveyed to any one. To show the descriptions of the several parcels of the Wakesham farm and the persons to whom the several parcels were to be conveyed, Abraham Longenecker drew a diagram of the farm and marked on each parcel the initials of the persons to whom the conveyances were to be made. That diagram was introduced in evidence on the hearing, and the initials were shown to be in the handwriting of Abraham Longenecker. It was shown that the initials on the diagram, "G. W. L.," were meant for George W. Longenecker, the initials "S. G." meant the defendant Sarah E. Graham, and the initials "B. & C." meant his son and daughter Benjamin S. Longenecker and Clara Snell. After the deeds were executed they were handed to Mr. Longenecker, and kept in his possession until November 27, 1899.

It is claimed by the complainant that after the deeds were drawn and before November 27, 1899, Mr. Longenecker discovered that the deed to Sarah E.

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Graham was not as he desired it to be, and he had a new deed drawn to her on the 27th day of November, 1899, of "the northeast quarter of the northwest quarter of section thirty-two, town four south, range nine west. My wife Margaret Longenecker, shall have the use and benefit of said land with all rents as long as she shall live." This deed was made to Sarah E. Graham for her lifetime, at her death to be equally divided between her children, but subject to the life estate of Margaret Longenecker.

It is also said this deed was drawn by Mr. Kingsley. Abraham Longenecker gave him the former deed from which to get the description and directed him to burn the other deed, and he did burn it. At the time the deed was executed to Sarah E. Graham, November 27, 1899, none of the deeds had been delivered, but they remained in the possession and control of Abraham Longenecker. After the new deed was drawn to Sarah E. Graham and the former deed burned by Mr. Kingsley, Mr. Longenecker handed them to his son Adam, and told him to see they were put on record after his death and delivered to the parties; and after the death of his father Adam Longenecker had them recorded and delivered them to the different parties as directed.

That part of the decree from which an appeal is taken which it is necessary to quote reads as follows:

"III. That the quitclaim deed executed by Margaret Longenecker, one of the complainants in this cause, to the defendant Sarah E. Graham on the 23d day of September, A. D. 1905, of the northeast quarter of the northwest quarter of section number thirty-two, town four south, range nine west, is hereby decreed to be null and void and of no effect and the same is hereby canceled, and the complainant Margaret Longenecker is hereby decreed to have the right to the use and benefit and possession of said land last above described from and after the 27th day of November, A. D. 1899, and for and during her natural

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life, and after the death of the said Margaret Longenecker the said defendant Sarah E. Graham is hereby decreed to have the right to the use and possession of said land for her lifetime, and after the death of said defendant Sarah E. Graham the same to be equally divided between the children of said Sarah E. Graham, in accordance with the terms of the deed of the land last above described executed by Abraham Longenecker to Sarah E. Graham, and recorded in the office of the register of deeds of Kalamazoo county, Michigan, on the 14th day of December, A. D. 1899, in Liber 106 at page 370."

"IV. And it is further ordered, adjudged and decreed that the contract entered into between Margaret Longenecker, Adam Longenecker, Benjamin S. Longenecker and Sarah E. Graham on the 24th day of October, A. D. 1905, a copy of which is set forth in the twentieth paragraph of the bill of complaint in this cause, be and the same is hereby canceled, and said contract is hereby decreed to be null and void."

"V. And it appearing to the court from the pleadings and proofs in this cause that at the time of the execution of the quitclaim deed of the northeast quarter of the northwest quarter of section number thirty-two, town number four south, of range nine west, by the complainant Margaret Longenecker to the defendant Sarah E. Graham, she, the said Margaret Longenecker, paid to said defendant Sarah E. Graham and Louis E. Graham, the sum of $600, which payment of said sum was procured by the fraud, false representations and threats of said Louis E. Graham and Sarah E. Graham and was without consideration: It is therefore further ordered, adjudged and decreed that the said defendants Sarah E. Graham and Louis E. Graham pay forthwith to said complainant Margaret Longenecker the sum of $600 and interest thereon at the rate of 5 per centum per annum, from the 23d day of September, A. D. 1905, to the date of this decree, amounting in all of principal and interest to the sum of $767.50 and interest thereon at the same rate until the same is paid."

"VI. And it is further ordered, adjudged and decreed that the temporary injunction issued in this cause on the 18th day of May, A. D. 1910, restraining the defendant Sarah E. Graham and John C. Davis,

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justice of the peace, from proceeding with the trial of the action at law, commenced before said John C. Davis, one of the justices of the peace of the city of Battle Creek, Calhoun county, Michigan, on the 25th day of April, A. D. 1910, by the defendant Sarah E. Graham against the complainant Margaret Longenecker, until the further order of this court be and the same is hereby made permanent, and the said defendant Sarah E. Graham is hereby perpetually enjoined from proceeding further with said action at law before said John C. Davis, and from prosecuting the same in said justice's court or in any other court against said complainant Margaret Longenecker for the same cause of action."

Mr. and Mrs. Graham claimed that the first deed to Mrs. Graham, which was drawn by Mr. Wilcox, of 40 acres of land was in fee simple, absolute, without any reservation of the life estate to Margaret Longenecker, or any one else, and they claimed that Adam Longenecker had destroyed the deed to Sarah E. Graham made on November 8, 1899, and had procured his father by undue influence to execute the deed of November 27, 1899, to Sarah E. Graham, reserving a life estate to the widow, and to Sarah E. Graham for her lifetime after the death of Margaret Longenecker, and at the death of Sarah E. Graham to be equally divided between her children. To show this they took the deposition of Mr. Wilcox, but he testified that Mr. Longenecker directed him to draw all the deeds subject to a life estate in Mrs. Longenecker, and that he believed he so drew them. Mr. and Mrs. Graham, under circumstances hereafter stated, procured from Mrs. Longenecker a quitclaim deed of the 40 acres of land conveyed by Abraham Longenecker to Sarah E. Graham by the deed of November 27th, and $600 in cash which they claimed for the use of the land from the time of the death of Abraham Longenecker. This deed bears date September 23, 1905, and the $600 in cash was paid by her at or about that time.

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When Margaret Longenecker's other children found she had made the quitclaim deed and paid the Grahams $600, and on or about the 27th day of September, 1905, a petition was filed by them in the probate court of St. Joseph county for the appointment of a guardian for Margaret Longenecker as mentally incompetent to have the control of her person and property, and alleging that she was the owner of a life estate in 160 acres of land valued at $500 per year or thereabouts. While this petition was pending in the probate court and on or about the 24th day of October, 1905, Mrs. Longenecker was induced to sign a contract, which is spoken of later as a ratification of the deed, which she asks in her bill of complaint to have canceled as well as the quitclaim deed. Sarah E. Graham and her husband, Louis E. Graham, opposed the appointment of a guardian, and it is their claim this contract was understandingly made. After the contract was signed, the probate court for St. Joseph county made an order adjudging her to be mentally incompetent, and appointed a guardian. Mr. Barnabee qualified as guardian and acted as such until on or about June 25, 1908, at which time the probate court made an order discharging the guardianship. Mrs. Longenecker refused to recognize the quitclaim deed and the contract, and this litigation resulted.

It is conceded that the decree correcting the mistakes in the descriptions of land other than the 40 acres relating to Mrs. Graham, should stand. Mrs. Graham insists that she should be decreed to be the owner of the 40 acres and that the contract made between her mother and herself should stand.

Counsel say in the brief:

"The disputed issues included in the portion of the decree not consented to are those involved in the controversy between Margaret Longenecker and the defendants. They are:

"*First.* Was Margaret Longenecker mentally com-

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petent to enter into an agreement adjusting the claim of Sarah E. Graham on or before September 15, 1905, and to carry out that agreement September 15 and 23, 1905?

"*Second.* Did Margaret Longenecker voluntarily make such agreement and was its fulfillment voluntary on September 15 and 23, 1905?

"*Third.* Were the transactions of September 15 and 23, 1905, void for want of consideration or by reason of fraud or duress?

"*Fourth.* Were the deed and agreement of September 15 and 23, 1905, subsequently confirmed and ratified by Margaret Longenecker, Adam Longenecker, and Benjamin Longenecker by the agreement of October 25, 1905? * * *

"*Sixth.* After her release from guardianship did Margaret Longenecker recognize Sarah E. Graham's right to the land in question by her refusal to allow her tenant to cultivate it and by giving her written consent to let Mrs. Graham lease said land?"

The first three of these propositions may be discussed as one.

The record shows that Mrs. Margaret Longenecker, who was then upwards of 70 years of age, had been very ill during 1905. It also shows that after her husband had procured Mr. Wilcox to make the deed he procured Mr. Kingsley to make another one of the 40 acres to Mrs. Graham and caused the Wilcox deed to be burned. It also appears that Mr. and Mrs. Graham insisted this change was not the act of her father, but charged it to one or more of the brothers of Mrs. Graham, and following this claim they procured the quitclaim deed and money from Mrs. Longenecker.

The testimony of Mrs. Margaret Longenecker and of Mr. and Mrs. Graham as to what occurred at the house of Mr. Ernst just before Mrs. Longenecker made the quitclaim deed, is conflicting.

The testimony of the Misses Ernst is illuminating. We quote the material parts of the testimony given by Lillian Ernst:

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"I certainly recollect in the month of September, 1905, of Mrs. Longenecker visiting at our house in Mendon. She came the 15th of September. She came just to make her visit that she usually makes about twice a year. My sister married her son George Longenecker. While Mrs. Longenecker was staying at our house on that occasion, Mr. and Mrs. Graham came there. I imagine about half past 2 o'clock or about 2 on the 23d, Saturday. Mrs. Longenecker was sitting by the window looking out and said, 'There comes Lew and Sadie, I wonder what they are coming for.' They came into the house. They said they had come to take grandma home. She said she was not ready to go home. She told them she was not ready to go. They came in and were as pleasant and nice as could be. Talked about everything and about our work and about the weather and everything of that sort and wanted to go out to the garden and look at the flowers and we went out in the garden and walked around there. They were as nice as could be until it began to get dark, then they wanted she should go home with them and we told them she had just come and her visit was not out and we wanted to keep her as long as we could, and when they saw she was not going that way they simply tried to force her to go. They asked if they could have a private room where they could talk with her. My sister was in the parlor unable to leave her chair, she had been very sick, and there was no door between the parlor and sitting room, and I told them they could go into the dining room if they liked, if it was necessary, and they went into the dining room and closed the door. We heard nothing but loud, angry voices, talked loud in a threatening way until we were very much frightened too. We could only distinguish one sentence. We distinctly heard him say: 'If you don't do it I will ruin the boys.' Graham said that. There was no one else in the house with us except Mr. and Mrs. Graham and Mrs. Longenecker. I should judge they remained in the room about 15 or 20 minutes. When they came out of the room Mrs. Longenecker had been crying, and she was very much upset and was nervous. She could hardly walk. When she came out of the room she said, 'I will have to go home with them. They told me if I didn't go they would

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ruin the boys.' At the time she said that Mr. and Mrs. Graham were in the dining room and the door was open, and they came out behind her. I think they were near enough so they could hear what she said. When they came out of the dining room and Mrs. Longenecker concluded to go home with them I imagine it was quite a bit after 4 o'clock, getting dark in September between 4 and 5."

Dora Ernst testified substantially the same.

Mrs. Longenecker testified that the Grahams threatened her:

"Then he told me that he wanted me to give him a deed of the land and that he would ruin my boys if I didn't. In the first place I said I wouldn't and declared I wouldn't. At last I gave up to him and told him I would give it to him if he would let the boys alone. I told him he was not entitled to it. I was excited and crying while I was in the room there. The Ernst girls were in the other part of the house, but they heard. The door was closed between us, but they heard all about it, or something about it. You can ask them. After remaining in the room for some time I went home with them. We got home about night. They were living in Leonidas at that time. They kept dinging about it, they said they wanted to have that. Lew Graham said he knew it was meant for him and his wife, that her father meant it so, and that was not true. When he said he knew her father meant it so I said I knew he didn't. They made threats after they got to their home. They didn't just threaten, of course. I suppose they would have. I just stuck to it and said I wouldn't do it. I finally signed the quitclaim deed to Mrs. Graham, of course, I had to sign it."

Mr. Graham and his wife deny there was loud talking.

Mr. Graham testified in part:

"There was no loud and angry talk there on my part and the part of my wife. I did not say to Margaret Longenecker, 'If you do not do it we will ruin the boys,' I did not say it in that way. I said if she did not want to do it, it might ruin the boys. I simply told

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her we would test out that deed just as she said it was. * * *

"*Q.* Why was it necessary for you to say to her there at Ernst's if she did not do it, it might ruin the boys?

"*A.* Because we made up our minds we would have it just as she wanted it, and have it done there and while I could show just what I knew about it being changed. While there at Ernst's she did not refuse to sign the deed, she did not refuse until the next day and didn't refuse at Ernst's place."

Mrs. Graham testified in part:

"I don't know as Mr. Graham was angry while in the dining room. He was angry at being treated the way we were about our grocery bill, most any one would be. He was angry at my brother. I don't think he talked in a loud and angry voice to my mother. While in the dining room I think Mr. Graham said to my mother, 'If you don't do it we will test those deeds and that might ruin the boys.' Those are the words he said. When he said it might ruin the boys I don't know what my mother said."

There was much other testimony which it is not necessary to quote. It will be observed that the Grahams were asserting a claim contrary to the writings made by Mr. Longenecker, and contrary to the testimony of their witness, Mr. Wilcox. We think it clear these papers were obtained from Mrs. Longenecker under such circumstances they ought not to stand. See *Seeley* v. *Price,* 14 Mich. 541; *Wartemberg* v. *Spiegel,* 31 Mich. 400; *Crawford* v. *Hoeft,* 58 Mich. 1 (23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870); *Finegan* v. *Theisen,* 92 Mich. 173 (52 N. W. 619); *Smith* v. *Cuddy,* 96 Mich. 562 (56 N. W. 89); *Lockwood* v. *Lockwood,* 124 Mich. 627 (83 N. W. 613); *Sands* v. *Sands,* 112 Ill. 225; *Norton* v. *Norton,* 74 Iowa, 161 (37 N. W. 129).

We now come to the question of ratification. The agreement of October 25, 1905, was made while the guardianship proceedings were pending and which re-

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sulted in an adjudication that Mrs. Longenecker was mentally incompetent. What followed after the guardian was discharged does not amount to a ratification which should bind the parties.

The decree is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, STONE, and OSTRANDER, JJ., concurred.

TISMAN *v.* TISMAN.

1. DIVORCE—BILL OF REVIEW—NEWLY DISCOVERED EVIDENCE.
   On the ground of newly discovered evidence, complainant in divorce proceedings is entitled to present a petition for leave to file a bill of review more than one year after the entry of an adverse decree, the question being governed by the exception stated in Chancery Rule 27, which requires such petition to be filed within a year, except for newly discovered evidence or on sufficient cause shown.

2. SAME—PETITION FOR LEAVE TO FILE BILL OF REVIEW.
   The granting or denial of a petition for leave to file a bill of review is discretionary and may be reviewed only for abuse of discretion.

3. SAME.
   Where complainant, a widow, married defendant on acquaintance of about one day, and immediately following the ceremony returned to Chicago, where she had been living, to dispose of her effects, remaining for several months, and becoming estranged from her husband, who later filed a bill for divorce, and made a complete settlement and satisfaction of the claims of complainant to his property to induce her to withdraw her defense, and where a divorce was denied in that cause but subsequently

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granted to the husband on a cross-bill that he filed in her suit for separate maintenance, it was not an abuse of discretion to deny complainant's petition for leave to file a bill of review based on the discovery of evidence of adultery committed by the husband, the testimony showing that he had remarried since the entry of the decree, and that no equitable considerations required the interposition of the court.

Appeal from Wayne; Hally, J. Submitted April 11, 1913. (Docket No. 42.) Decided July 9, 1913.

Bill by May Tisman against George F. Tisman for separate maintenance. Defendant was granted a divorce on his cross-bill charging extreme cruelty. From an order denying complainant's petition to file a bill of review, she appeals. Affirmed.

McHugh, Gallagher & McGann (Gustav E. Beerly, of counsel), for complainant.

Joseph W. Donovan, for defendant.

STEERE, C. J. In this suit complainant has appealed from an order of the Wayne county circuit court in chancery, dated January 7, 1913, denying her petition for leave to file a bill of review in a suit instituted by her on January 27, 1911, against defendant for separate maintenance, charging him with nonsupport, extreme cruelty, and adultery, and in which, on October 27, 1911, her bill was dismissed and a decree for divorce granted to defendant George F. Tisman on his cross-bill charging her with extreme cruelty. At the time this petition was filed, on December 7, 1912, over a year after the parties had been divorced, defendant had remarried and was living with his third wife and a child by a wife who preceded complainant in their home in Detroit.

The matrimonial alliance between complainant and defendant appears to have been a case of married in

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haste to repent in haste. They first met March 21, 1909, were joined in the bonds of holy matrimony March 22, 1909, went to a ten cent theater, drank some beer together after the wedding, at her suggestion, and separated that afternoon, temporarily as was then supposed, and never lived or cohabited together as husband and wife. The respective ages of the parties are not disclosed, but each had been previously married. Their meeting was brought about through the supposedly kindly offices of a mutual acquaintance and his wife, who, being advised that each was inclined to matrimony, arranged for the parties to meet at their house, calling complainant from Chicago for that purpose by a letter stating that they had a prospective husband for her.

Complainant was a widow, residing in a flat in Chicago, where she had some furniture and other personal property. After her marriage she hastened back the same day, with consent of defendant, avowedly to dispose of her property there preparatory to changing her residence to live with him in Detroit. Her next appearance in Detroit was on June 10, 1909, when an interview between the parties, the circumstances of which are in dispute, resulted in their permanent estrangement and subsequent divorce proceedings.

On March 23, 1909, the day after she left, defendant wrote complainant, in reply to a letter from her, urging that she "rush things as much as possible" and return; that his daughter was ill and he was anxious for complainant to come and care for her. He wrote her again urging her to return on March 26th, April 2d and 5th, saying in the last letter:

"Now, if you can't get here by Saturday, April 10, I will have to hire a housekeeper. Let me know by return mail, but it is to be hoped that you will be ready to start for Detroit by the time this letter reaches you."

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On April 10th he wrote that he had not seen or heard from her, not to sell her property, and that he did not want to hear from her again. On April 14th, in reply to a letter from her, he wrote:

"Your conduct has been such that I never could forget the unkind love that you have showed toward my child when it was sick and I begged of you to come and look after her."

In the meantime he hired a housekeeper with whom it is charged he became criminally intimate, to which fact his subsequent conduct and rejection of complainant is ascribed. Complainant's frequent letters to him explaining and excusing her delay in returning did not placate him, and on April 21, 1909, he wrote in reply to a letter from her:

"I have the most bitter feeling toward you, so save your time and postage as I don't want to hear from you any more."

On June 10 or 11, 1909, complainant went to Detroit to the house of the friends who had introduced her to defendant and from there went and interviewed him; matters were talked over between them; she claims he agreed to receive her as his wife and shortly thereafter declined to do so, refusing to give her even enough money to pay her fare back to Chicago. He claims she made a demand on him for money; that he told her his home was open to her; but she demanded a settlement and stated she had arranged with her Chicago lawyer to attend to it for her if necessary, whereupon defendant refused to comply with her demands or to support her. That an adjustment on a financial basis was under discussion is evident. She testifies:

"I then offered to live with him as his wife. * * * He said to me, 'Will you sign the papers for $50 or $75?' and I said, 'No.' A few minutes later he said, 'Will you settle for $50?' and I said, 'I will not settle until I think this thing over;' and then he said he

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would see me next day. I took the train back that night for Chicago."

On August 3, 1909, defendant filed a bill for divorce, with an affidavit of complainant's nonresidence, preparatory to proceeding by substituted service, when she, learning of this suit, returned to Detroit and employed counsel to protect her interests. She was thereafter personally served, in Detroit, with a certified copy of the bill of complaint, affidavit of nonresidence, and order of publication. She appeared in the suit, by her solicitor, filing an answer, cross-bill, and petition for temporary alimony.

While complainant was in the city of Detroit, negotiations were entered into between the parties for a financial settlement of their matrimonial affairs; each being represented by counsel. As a result a stipulation of settlement was entered into on August 11, 1909, signed and accepted by the respective parties and their solicitors, providing for the payment to her of $150 in full of all her claims against defendant in said cause. She also at the same time signed a release of—

"All her claims against said George F. Tisman for past, present, and future support and maintenance, as his wife, and likewise all her claims of dower in and to any and all property now owned, possessed, and held, legally, equitably, or otherwise, or which may be hereafter owned, possessed, and held, by said George F. Tisman, and likewise all her claims of every kind, nature, and description whatsoever, past, present, or future, against said George F. Tisman, as his wife, or otherwise."

This instrument was approved and witnessed by the solicitor who represented her at that time, and who appears for her in this cause; who also, as a notary public, took her acknowledgment of its execution.

Though these papers were signed and acknowledged on August 11, 1909, it is conceded that a complete settlement was not reached until October. She went

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back to Chicago in August and returned to Detroit in October, at which time she withdrew her answer and cross-bill to defendant's bill for divorce and was paid the money previously agreed upon. She left for Chicago the same day, believing, as she states, that "matters were so situated that he could get his divorce." He endeavored to do so, but, after hearing the case, the court dismissed his bill on March 3, 1910.

Although defendant had previously advised complainant to save her postage, as he did not want to hear from her any more, she manifestly wrote him further, and on June 5, 1910, in answer to a letter from her, he wrote that he was "sorry that we have had such trouble, * * * and, if you want to sell your furniture and come on and live with me, all well and good and I will try and do my part." Complainant thereafter went to Detroit and called at defendant's home, which she found in charge of a housekeeper, who did not give her a cordial reception. An interview with defendant terminated without reconciliation. She testifies to offering to live with him as his wife and care for his home, but that, owing to his relations with and the influence of his housekeeper, he rejected her. He testifies that, after writing the letter on June 5th, he had thought it over, and, remembering how she had acted, he telegraphed her not to come, but she came right on, and, after an interview in which she proposed conditions which were not acceptable, he declined a reconciliation. She thereupon went back to Chicago and on January 27, 1911, returned to Detroit and filed her bill of complaint against defendant for separate maintenance, which resulted, whether rightfully or wrongfully, in her bill being dismissed and defendant being granted a decree of divorce on his cross-bill as stated. On the hearing of this suit it was charged, and testimony was introduced by complainant to show, that defendant was guilty of adultery with his housekeeper, whom he had employed shortly after

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he was married to complainant owing to failure of the latter to return when expected. Complainant had subpœnaed this housekeeper as a witness, but she failed to answer the subpœna, and an officer with an attachment was unable to find her. Defendant positively denied any improper relations with the housekeeper or any knowledge of where she was at the time of the hearing.

After obtaining his divorce, defendant lost little time in securing another wife. The housekeeper objected, and claimed he had promised to bestow that honor upon her as soon as he was free from his previous entanglements, and, when he married another, came from under cover with the proverbial fury of the woman scorned, and furnished complainant's solicitor with an affidavit of defendant's perfidy which, if true, brands him as a low and licentious criminal and perjurer. On the strength of this affidavit complainant applied for a rehearing on October 16, 1912; the decree having been granted October 27, 1911. This application was heard before another judge of the Wayne county circuit court, in chancery; the judge who granted the decree of divorce having in the meantime retired from the bench and become solicitor for defendant. In denying the petition the court said:

"This petition has been filed to set aside that decree and grant a rehearing. The petitioner has presented a very strong affidavit which would be entitled to very grave consideration were it not for the intervening rights of an innocent third party. Since the decree was given, the defendant has remarried and is now living with this wife. It should be a very extraordinary situation which would justify a court in disturbing this relation because of the consequent injustice to one who was not a party to the above proceeding. Such a situation does not now exist, and the prayer of the petition will be denied."

Thereupon, on December 7, 1912, this petition for leave to file a bill of review was filed and denied on

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January 13, 1913. From the order of denial this appeal is taken.

Complainant's counsel propose and argue, as material and controlling in this case, the three following questions:

(1) Does complainant possess the legal right at this time, and under the circumstances of this case, to file a petition for leave to file bill of review?

"(2) Does the settlement, as made with complainant, constitute an equitable division of her husband's property, and a fair, just, and suitable provision for her, in lieu of her dower and other claims against her husband's estate?

"(3) Are the facts, as established in complainant's petition for leave to file bill of review, such as to entitle her to file and maintain a bill of review?"

As to the first question, it is contended by counsel for defendant, as a matter of law, under Chancery Rule 27 and Act No. 299, Pub. Acts 1909, limiting the time of appeal, that the court has no power to entertain a petition for leave to file a bill of review at this time. This is not an appeal from the decree rendered herein but from the order denying complainant's petition. It was taken within the requisite time after the order denying such petition was rendered. Rule 27 limits the time for filing a bill of review to that allowed for bringing an appeal, "except upon newly discovered facts or evidence, unless upon reasons satisfactory to the court." This petition is based chiefly on the claim of newly discovered evidence. The rule is reviewed in *Barnes* v. *Kent Circuit Judge,* 97 Mich. 212 (56 N. W. 599), and construed more or less in *Stockley* v. *Stockley,* 93 Mich. 307 (53 N. W. 523); *Sheldon* v. *Hawes,* 15 Mich. 519; *Mickle* v. *Maxfield,* 42 Mich. 304 (3 N. W. 961); *Clark* v. *Huron Circuit Judge,* 40 Mich. 166; *Thompson* v. *Jarvis,* 40 Mich. 526; *Ryerson* v. *Eldred,* 18 Mich. 490; *Id.,* 23 Mich. 538; *Taylor* v. *Boardman,* 24 Mich. 287; *Id.,* 25 Mich. 527; *Case* v.

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Case, 26 Mich. 484; *Moote* v. *Scriven*, 33 Mich. 500; *Brewer* v. *Dodge*, 28 Mich. 359; *Maynard* v. *Pereault*, 30 Mich. 160; *Sanford* v. *Haines*, 71 Mich. 116 (38 N. W. 777); *Dodge* v. *Northrop*, 85 Mich. 243 (48 N. W. 505); *Noeker* v. *Howry*, 119 Mich. 626 (78 N. W. 669).

In *Sanford* v. *Haines*, *supra*, it is said:

"Under the rules, a bill of review should be filed within the time allowed for appealing, unless on newly discovered evidence, or when there has been some reason that is satisfactory for the delay."

Of the right of complainant to file and the court to pass upon the petition for leave to file a bill of review, there can be no question.

The granting or denying such petition was, however, a matter of discretion with the trial court. *Farmers' Bank* v. *Quick*, 71 Mich. 534 (39 N. W. 752, 15 Am. St. Rep. 280); *Barnes* v. *Kent Circuit Judge*, *supra*; *Knapp* v. *Perry*, 117 Mich. 97 (75 N. W. 1135); 16 Cyc. p. 523.

In *Stockley* v. *Stockley*, *supra*, it is said:

"An application for leave to file a bill of review is the method employed to obtain a rehearing and to vacate a decree after its enrollment; but the results to be attained, and the facts properly to be considered, are the same as though it were a motion for a new trial, or a motion for a rehearing and to vacate a decree before its enrollment, and in like manner it addresses itself to the fair discretion of a court. In passing upon it, each case stands by itself, and is controlled by the circumstances surrounding it, and without reference to any other case. The power of the court in granting or denying it is largely discretionary, and is always to be exercised in view of the peculiar circumstances of each case, so as to effectuate substantial justice, and protect the legal and equitable rights of the parties. Unless this principle has been violated by the circuit judge through an abuse of the fair discretionary power with which he is invested, his decision should not be disturbed."

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The inquiry is, therefore, whether the record discloses such an abuse of discretion as demands a reversal.

Complainant's second contention is that the settlement entered into in August and consummated in October, 1909, at the time she withdrew her answer and cross-bill to defendant's bill for divorce, does not constitute an equitable division of her husband's property and a just provision for her in lieu of dower and other claims against his estate. While that question is involved consequentially, it is not a proper ground for filing a bill of review at this time; no newly discovered evidence upon that subject is disclosed. There is no showing that the settlement was obtained by fraud or deceit or that defendant had more property than complainant then supposed. He is shown to be a workman engaged with the Detroit Woodoleum Company, "making borders around rugs." At the time this suit was heard, he was earning $25 per week, but when he started at the work earned much less. He had bought a house and lot upon contract, on which he had paid $1,365, and yet owed about $1,000. He had one child, a girl about 9 years old. He is not shown to have been especially thrifty or prosperous. From time to time he borrowed small sums from his employers, and on August 11, 1909, when the settlement between these parties was pending, he borrowed $170. At that time complainant was in Detroit with full knowledge of his circumstances, so far as shown. She had employed counsel, appeared and filed an answer and cross-bill in defendant's divorce suit. She had taken ample time to "think this thing over." With everything ready to push this case to a final hearing and have her rights determined, she voluntarily made a full settlement of all her claims against defendant, with her counsel present to look after her interests and witness the papers she signed. When the amount agreed upon was

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paid, she withdrew her defense and left for Chicago at once, expecting and believing that, as a result of her action, their relations were ended and "he could get his divorce."

That an unsuccessful attempt was later made to get together and assume the relations of man and wife does not defeat the validity of their contract of settlement, advisedly entered into, even though his ultimate refusal was the cause of its failure. Her subsequent suit for separate maintenance was not the result of any improvement in his financial condition, or any new discovery in that particular, but manifestly arose from his unexpected failure to get a divorce from her as they had arranged for and anticipated, followed by his vacillating and irritating conduct in accepting and rejecting her overtures. No impelling, equitable considerations arise in her favor. What rights she had were strictly legal rights arising from the bare fact of the marriage ceremony. They met for the first time one day, were married and separated the next, and never lived together as husband and wife. She did nothing for him, and he did nothing for her, after they separated, except to pay what was wrung from him by litigation. It can fairly be said, from this record, that neither of them entered into this hasty betrothal and practically contemporaneous, off-hand matrimonial alliance actuated by any worthy sentiments of regard or affection for each other. The record indicates that it was a money matter with her, and with him the temporary whim of one whose "unkind love" for the opposite sex is manifestly fervent but extremely migratory. Neither comes before the court with clean hands, and neither presents any claim for relief from nuptial disaster which specially appeals to the tender consideration of a court of equity.

It is asserted by counsel for defendant that "the record presented shows but a meager part of what

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was heard before Judges Rohnert and Hally or at the three days' hearing." This record is made up of the pleadings, decrees, and orders of the court, the petition with certain affidavits attached, and such portions of the testimony as complainant's counsel saw fit to make a part of the petition, together with the answer of defendant to said petition.

The subsequently obtained affidavit of Mrs. Harriet Alice Reed, defendant's discarded housekeeper, setting forth his criminal relations with her and conduct in preventing her from responding to a summons from the court to appear as a witness, is most seriously urged as a controlling factor which it is an abuse of discretion to disregard. It points to conduct on the part of defendant and deponent proper for investigation in the criminal courts, if substantiated; but in this suit between private parties, and under the facts disclosed, we are not satisfied that a court of equity must necessarily, at this time, entertain a bill of review to set aside a settlement understandingly made on a business basis so long before. The affidavit is by a self-confessed *particeps criminis*. The source, time, cause, and motive of making and presenting this affidavit, as well as the extent to which it should move the court at this time and in this case, if true, are all proper elements for consideration by the trial court, and we are unable to conclude that court, which dealt with the case in its entirety, has so abused its discretionary powers as to demand a reversal of its order denying leave, at this time, to open the case and file a bill of review.

The order of denial is affirmed, but without costs.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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FREDRICK *v.* WILLIS.

MECHANICS' LIENS—EVIDENCE—DEFECTIVE WORK.

In the absence of competent testimony to show the cost of remedying defects in the construction of a house, the opinion of the trial court, who found from the testimony and a view of the premises that the contractor had substantially complied with his contract and was entitled to recover nearly all the price provided for, will be affirmed, and defendant's suggestion and request that the cause be referred back for additional proofs, is overruled.

Appeal from Wayne; Donovan, J. Submitted October 14, 1912. (Docket No. 21.) Decided July 9, 1913.

Bill by George H. Fredrick and another against Martha Willis and others for the enforcement of mechanics' liens. From a decree for complainants, defendant Willis appeals. Affirmed.

Andrew C. Paterson, for complainant.

James H. Pound, for defendant.

MOORE, J. The bill of complaint in this case is filed by George H. Fredrick and Edward C. Bleich, the contractors, and cross-bills are filed by Ternes Coal & Lumber Company, materialmen, and John P. Berry Company, a subcontractor, to foreclose their respective liens on property of Martha Willis for labor and materials furnished for the construction of a house on her real estate in the city of Detroit.

The contract is a written one, but was so carelessly drawn that it is not surprising that it gave rise to controversies. The contract price for the house was $2,084. The contractors were not to furnish any paint

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or do any painting or finishing of the woodwork, Mrs. Willis agreeing to do the painting, and to finish the woodwork. The work was commenced in December, and was prosecuted during the winter months. It is claimed the house was completed about March 10, 1910, excepting some things that were left to be done after the frost was out of the ground. It is claimed by complainant that extra work was done of the value of $48. The contract was unusual, in that it did not require Mrs. Willis to make any payments until the house was completed. Controversy arose between the parties. Mrs. Willis commenced proceedings before a circuit court commissioner to get possession of the house, and when Mr. Fredrick found, on April 23, 1910, a notice from the circuit court commissioner tacked on the door of the house, summoning him and Mr. Bleich to appear in the office of the commissioner, the 22d day of April, 1910, he sent the keys of the house to Mrs. Willis, who took possession of the house on or about April 28, 1910, and has occupied the house ever since.

The defendant Mrs. Willis claims defective construction and inferior materials used in the building, while complainant claims that, if the woodwork had been painted in due time and properly finished, there would have been little cause for complaint. After hearing the testimony, the trial judge visited the premises, and, making an examination of the building, he rendered a decree in which he sets off the claim for extras and deducts an additional $30 from the contract price, $2,084, for deficiencies in construction, leaving a balance of $2,054 and interest, and on May 13, 1911, granted a decree allowing the complainants a lien for $2,108.87, and John P. Berry Company a lien for $52.50. Mrs. Willis has brought the case here by appeal. Her solicitor urges that the house be removed from the real estate; or, if this is not done, that a re-

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bate of $500 be made because of defective construction.

One of the special grievances of the defendant Mrs. Willis is that she did not get the furnace described in the written contract. The record discloses by a fair preponderance of testimony that a neighbor of hers was selling a different make of furnace from that mentioned in the contract, and urged her to buy his furnace, and the change was made with her knowledge and approval. The trial court had the great advantage of inspecting the premises. The questions involved are questions of fact. While Mrs. Willis claimed grave defects, she gave no satisfactory testimony as to what it would cost to make these defects good. What testimony was offered upon that subject was hearsay.

Counsel for Mrs. Willis recognize this may be urged, and suggest that, if the evidence is not clear enough in that regard, the case should be referred back to the trial court to take additional evidence. This suggestion does not appeal to us. The complainant has put his labor and material into this building, claiming a compliance with his contract. The circuit judge, after inspecting the premises, finds there was a substantial compliance with the contract. The defendant has had the use of this building since April, 1910, without making any payment thereon. We have a record of more than 200 printed pages. There was ample opportunity for Mrs. Willis to show what it would cost to make good the alleged defects, if any existed. As before stated, the trial court not only listened to the witnesses, but saw and examined the building. An examination of the record has not satisfied us he erred in the decree rendered.

The decree is affirmed, with costs.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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TWIN CITY CREAMERY CO. *v.* GODFREY.

1. DAMAGES—CONTRACTS—PROVISIONS IN LIEU OF DAMAGES.
   If parties agree upon a rule of damages to be followed in the event of a breach of the contract, no different rule or measure will be adopted by the court.

2. SAME—SALES—LIQUIDATED DAMAGES.
   Under a contract providing for the installation of a refrigerating plant, which the vendor guaranteed to be free from imperfections for the space of one year, promising to replace defective parts, etc., and further providing that if the plant should not fulfill the conditions of the contract, the vendor should be allowed to enter the buyer's premises, upon repaying the money paid, and to remove the plant, no different measure of damages than such repayment and removal was contemplated, the vendee not being entitled to recover damages suffered by reason of defendant's failure to install a satisfactory refrigerating system.

Error to Berrien; Bridgman, J. Submitted October 17, 1912. (Docket No. 122.) Decided July 9, 1913.

Assumpsit by the Twin City Creamery Company against Charles H. Godfrey and Ephraim L. Brant for breach of a written contract. Judgment for defendants on a directed verdict. Plaintiff brings error. Affirmed.

Willard J. Banyon and *G. M. Valentine (H. S. Gray,* of counsel), for appellant.

Cady & Andrews, for appellees.

BIRD, J. On January 15, 1910, Godfrey and Brant,

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the defendants, entered into a written contract with the Twin City Creamery Company, the plaintiff, to furnish and install in perfect working order a refrigerating plant in its factory at Benton Harbor and have it completed and ready for operation by May 1, 1910. The plant, when installed, was warranted to produce certain results. The work was delayed, and the plant was not completed until August 1st, at which time it was tendered to the Creamery Company, and acceptance was refused on the ground that it failed to produce the results guaranteed. Payment therefor being refused, Godfrey and Brant brought suit to enforce the same. A trial in the circuit court was had, and resulted in a verdict for the Creamery Company. With this issue resolved in its favor, the company, by written notices, dated February 27, and March 2, 1911, ordered Godfrey and Brant to remove the plant from its premises. This order was complied with and the plant removed. The Creamery Company then brought this suit against the defendants to recover damages for their failure to install the plant in accordance with the terms of the contract. At the trial of this issue it was the opinion of the trial court that under the proofs the plaintiff was not entitled to recover, and he, therefore, directed a verdict for the defendants. Various reasons are advanced by defendants in justification of the directed verdict, and among them the point is made that the parties agreed in the contract upon a measure of damages, in the event that defendants should fail to carry it out in accordance with its terms, and that now no other or different measure of damages can be invoked. The following paragraphs of the contract are relied upon to establish this proposition:

"It is further understood and agreed that the party of the first part guarantees the said plant to be free from imperfections in materials and workmanship for

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the period of one year from the date of this contract and said party of the first part agrees to replace any such part or parts found defective by said party of the first part, during the aforesaid time."

"It is further understood and agreed that providing said plant does not fulfill the conditions of this contract, said party of the first part shall be allowed to enter the premises of said party of the second part and remove the said refrigerating plant without any hindrance in any manner upon the refunding of any money which has been paid to the party of the first part by the party of the second part."

We must assume that the foregoing provisions were inserted in the contract to mean something, and, fairly construed, they mean that the parties agreed in advance upon the measure of damages which should govern in the event that the plant, when completed, did not measure up to the specifications contained in the contract. This measure of damages, read in connection with other provisions of the contract, means that if defects appeared in the materials or workmanship of the plant within one year from the date of the contract, the defendants were in duty bound to correct them. If the plant did not meet the stipulations in the contract, the defendants were to remove it after refunding any payments made thereon. Under this agreement, the plant was constructed, and it fell short of doing what was promised for it. An attempt was made by defendants to remedy some of the defects, but the Creamery Company would not permit it. The defendants were then ordered to take it away, and the order was obeyed. The rule agreed upon has been followed so far as the rights of the plaintiff are concerned, and we are of the opinion that no other damages were contemplated. Where parties agree upon a rule of damages to be followed in case of a breach of an agreement, no other or different rule will be enforced. *Monroe* v. *Hickox, Mull & Hill Co.*, 144 Mich. 30 (107 N. W. 719); *Black* v. *De Camp*, 78 Iowa,

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718 (43 N. W. 625); *Canavan* v. *Neeld*, 189 Pa. 208 (42 Atl. 115); 35 Cyc. p. 633.

We are of the opinion that the trial court was not in error in directing a verdict for the defendants.

The judgment will be affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

VAN SYCKLE *v.* THOMPSON.

COMPROMISE AND SETTLEMENT—FRAUD—EVIDENCE.

In a suit to vacate a compromise of complainant's interest in an estate of her grandfather, on the ground that she was defrauded or mistaken as to the value of the interest which she was entitled to, evidence that her solicitors had, previously to the compromise, advised her in relation to her rights, and the extent of decedent's estate, refuted her claim of ignorance and of fraud practiced by defendants.

Appeal from Macomb; Tappan, J. Submitted November 12, 1912. (Docket No. 95.) Decided July 9, 1913.

Bill by Hattie Bristol Van Syckle against William Thompson and another for the cancellation of a deed and contract of settlement. From a decree for defendants, complainant appeals. Affirmed.

Stewart & Jacobs and *John A. Weeks*, for complainant.

Henry B. Graves, for defendants.

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MOORE, J. In April, 1889, Joel Thompson died in the village of Romeo, Mich., leaving as heirs the complainant, a granddaughter, the defendant William Thompson and Noah Thompson, his sons, and his widow, Sarah R. Thompson. The mother of complainant was a daughter of Joel Thompson, and died in August, 1880. Joel Thompson executed to the complainant (then Hattie Bristol) a deed of lots 7 and 8 of Hartung's addition to said village of Romeo, which deed bears date December 22, 1884. Joel Thompson on the 13th day of June, 1888, executed his last will bequeathing his entire estate to the defendant William Thompson, subject to the life use of the personal property in the widow, Sarah R. Thompson, and also subject to the care and support of Noah Thompson, brother of William Thompson. At the time the deed to the complainant was executed the deed was placed with one J. L. Starkweather in escrow, to be delivered to her upon the death of her grandmother, Sarah R. Thompson. The grandmother died July 17, 1904. The complainant was born in 1880. After her grandmother's death, she was informed by the defendant that one J. L. Starkweather held the deed in question. On October 3, 1904, she, accompanied by her husband, went to the office of Mr. Starkweather in Romeo to secure the deed. Mr. Starkweather read the deed to her, but did not deliver the same. An effort was then made by Mr. Starkweather to obtain a quitclaim deed from the defendants to the complainant of any interest they might have in said property. The deed to the complainant comprised the homestead of the said Joel and Sarah Thompson. Through mistake this deed was not signed by Mrs. Thompson. The defendant William Thompson, learning of this fact, denied the validity of the deed, and began proceedings to set the same aside, claiming title to the property therein described as the residuary legatee under the said will of his

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father. Mr. Starkweather was employed in that litigation, and to carry it on, a mortgage was made on the Romeo property to one Chamberlain. Later Mr. Starkweather employed Canfield & Erskine to assist in the litigation. An answer was prepared and filed in the case by Mr. Canfield. Later negotiations were had for a settlement, which resulted in the complainant giving to Mr. Thompson a quitclaim deed to the Romeo property and to all property owned by the grandfather of complainant, and her signing a contract relinquishing all claims to his estate and settling the litigation. This bill of complaint is filed to obtain a cancellation of this deed and contract, and to establish complainant's right to a share in her grandfather's estate.

The trial judge filed a written opinion, from which we quote as follows:

"The ground upon which decree is asked is the claim that fraud was practiced upon complainant by the defendants Thompson, and their solicitor Hosner, in securing the said deed and contract from her, and the fact that she so settled the matters named in the contract while ignorant of her rights in the property involved and was ignorant of its extent and value. * * * One of the chief reasons upon which fraud is based is the claim that, when complainant executed the deed and contract in question, she was ignorant of the fact that she might, as a result of the litigation settled, obtain a one-third share of her grandfather's estate, and that she was ignorant of the extent and true value thereof. It is my conclusion that an extended finding upon the issues thus raised is unnecessary. Complainant's claim that she was ignorant of her rights in the estate and of the value and extent thereof is not supported by the proofs. The proofs show that she was fully advised by her solicitor, Mr. Canfield, as to her rights upon settlement, and he repeatedly advised her as to care and caution in the settlement of these rights, as well as to the extent of her claim. The correspondence between complainant and Starkweather shows that she was again fully advised as to her rights, and also as to the amount of

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the property involved. All of this information was given complainant long before she executed the deed and contract of settlement which she now seeks to set aside. At the time of settlement the former suit was undetermined, and there was nothing to indicate whether her claims to this property, as set forth in her cross-bill, filed in the former suit would be sustained. Her mortgage given on part of the property involved to Chamberlain for $500 was assumed by Thompson. He also assumed the payment of the costs of litigation and the payment of her solicitors and the sum of $200 in addition, a total of $400. In view of the pendency of this unsettled litigation, the payments made by Thompson by way of settlement, and the information she received from her solicitors as to the matter of settlement and the extent of the property, it cannot be said that either actual fraud was practiced upon complainant by the Thompsons or Hosner, or any of them, nor was there constructive fraud on account of a discrepancy between the actual value of the property and the amount she received therefor. Complainant was competent to understand, and did understand, the nature of the transactions involved and is bound by the settlement openly entered into by and between her and the defendants herein."

The case is brought here by appeal.

It is urged with much earnestness that the decree is wrong, that facts were withheld from complainant, and that she did not know that her grandfather left any estate except the real estate which it was attempted to deed to her. She and her husband so testify. The oral proof offered by the defendants contradicts most emphatically that offered on the part of the complainant. The oral proof taken as an entirety is an illustration of how unreliable the human memory is when affected by self interest. There was an interview in Detroit to talk over a settlement at which the attorneys for the respective parties were present. The complainant was accompanied by her husband. At this time she was upwards of 25 years old. She had received letters from which we make excerpts:

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"MT. CLEMENS, MICH., August 28, '05.
"HARRIETTE VAN SYCKLE,
"Battle Creek, Michigan.
"*Dear Madam:*
"We are after Willie Thompson good and hard. Mr. Canfield and Mr. Erskine and I went over all the probate records and record in register's office and I can say to you confidentially that if the deed is set aside which they swear is worth $1,800, we shall claim you was left out of the will and by this error in homestead deed or faulty delivery, we ask for the original $1,500 again we also shall offer that you are entitled to one-third of the estate of $7,000, $2,333.33 and interest on this sum from 1890 over 15 years. We will ask him to contribute all as he purchased all other rights and interest under the will and he is the surety on the bond of Wm. L. Dicken, the executor. * * *
"I am respectfully,
"J. L. STARKWEATHER."

"[Letter head of J. L. Starkweather, Attorney, Romeo, Michigan.]
"October 26, 1905.
"MRS. HARRIETTE B. VAN SYCKLE,
"Battle Creek, Michigan.
"*Dear Madam:*
"I received your letter some few weeks ago. I was in hopes to be able when I answered your letter to name a day when your case would be tried. I was at Mt. Clemens on Monday and Mr. Erskine informed me that Judge Knight had not filed any answer to our cross-bill. I was in Detroit yesterday and saw Mr. Canfield and he is quite anxious to take the matter up. I learned that the Judge and most of the attorneys are away hunting. I have made two trips to Ann Arbor to see Wm. L. Dicken but so far have not been able to find him at home. I wished your uncle would run down and see him at Ann Arbor or accidentally call upon Will Thompson, the complainant and ascertain if he is willing and ready to turn over the $3,000 of Joel Thompson's estate. I am of the impression that he will send a messenger to settle with you personally rather than go on with this suit. * * *"

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"[Letter head of J. L. Starkweather, Attorney, Romeo, Mich.]

"ROMEO, MICHIGAN,
"November 3d, 1910.

"MRS. HARRIET BRISTOL, now VAN SYCKLE,
"261 East Van Buren Street,
"Battle Creek, Mich.

"Dear Madam:

"I have just received your letter of Nov. 1st, and I have made a copy of the same and sent to Hon. F. H. Canfield at Detroit, and requested him to write to you at once what he thought best to do. I would say that it woud be a proper thing for a settlement to be made in the matter either in court or at Mr. Canfield's office at Detroit. If settled in court and the deed should be set aside, you then would have one-third of Joel Thompson's estate, which would be between $2,500 to $3,000. When they understand that they have got to pay this money, if their own bill is granted, they will come to a settlement that we may name. * * *"

This letter was signed by Mr. Starkweather.

The complainant says she was warned against Mr. Starkweather by the defendants; they stating he was dishonest and unreliable, and for that reason placed no reliance upon his statements. We now quote another letter:

"November 22d, 1905.

"MRS. HARRIETT VAN SYCKLE,
"261 East Van Buren Street,
"Battle Creek, Michigan.

"Dear Madame:

"I have yours of the 21st inst., with copy of Mrs. Thompson's letter. I think the true reason why your uncle makes an offer of settlement is that he is afraid of the result of the case if it is tried, and that he has probably been advised by his counsel that his title to the property in Romeo is very doubtful. The indications to me are that they fear that the court will sustain your claim.

"You will recall that I said to you when you were in my office some time ago that if the court should decide that your deed to the Romeo property was not valid,

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it would open the door for you to claim the share in all the property which your grandfather left, which your mother would have been entitled to if she were now living. I based my opinion upon the statute of the State, which provides that where a child or grandchild would be entitled to an equal proportion of the property with the other heirs.

"I always favor the settlement of matters of this kind, upon proper and just grounds. I do not think that the offer which your uncle has made you is a proper offer, and I do not think it ought to be accepted. I think it would be much better for him and for you if he really wants to make a just settlement, to meet at my office where the whole matter can be talked over and fairly considered. If this is done, there ought not to be much trouble in arriving at a just settlement. You ought not to consent to negotiate with him, unless Mr. Erskine or myself, or both of us are present, and I think you should write your uncle to that effect.

"Yours truly,

"F. H. CANFIELD."

An interview was had in Detroit, but no settlement was reached. Later the defendants went to Battle Creek with their attorney, and were accompanied by the complainant and her husband to the office of a lawyer at Battle Creek. There is the widest conflict in the testimony as to what occurred. A settlement was discussed, but none was reached. Later a second visit was made to Battle Creek, where a settlement was discussed. Finally the quitclaim deed and contract which are the subject of this controversy were made. In the deed the property is described as follows:

"Forever all that certain pieces or parcels of land, situated in the village of Romeo, in Macomb county, and State of Michigan, known and described as follows: Lots seven and eight of Tillson's and Harthung's addition to the village of Romeo, Macomb county, Michigan, and also the following described property situated and being in the township of Ray, Macomb county, Michigan, known and identified as the lands owned by Joel Thompson, deceased, at the time

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of his death and located in sections 8 and 9 in said township of Ray, Macomb county, Mich., and left by will executed by said Joel Thompson, on the 13th day of June one thousand eight hundred eighty eight, to said Willie Thompson."

The written contract contains the following language:

"Whereas suit has been started and is now pending by said *Willie Thompson* vs. *Hattie Van Syckle, et al.*, to quiet title of said Willie Thompson to property in the village of Romeo known as lots seven and eight of Tillson's and Harthung's addition to the village of Romeo, Michigan, and, whereas the said Hattie Van Syckle in said suit makes claim to an interest in property above described and also makes claim as an heir at law of Joel Thompson deceased, to an interest in his estate: Now, therefore, for the purpose of disposing of the suit now pending in the Macomb county circuit court as above mentioned, so far as the said Hattie Van Syckle is concerned, and for the purpose of releasing her said interest in lots seven and eight of Tillson's and Harthung's addition to the village of Romeo, Michigan, and for the purpose of releasing any and every claim she may have at the present time or might have at some future time to any part or portion of the estate of Joel Thompson, deceased, she, the said Hattie Van Syckle, for and in consideration of the sum of four hundred dollars ($400.00) releases, assigns and turns over to the said Willie Thompson any and all right, title and interest she may now have or might have at some future time in and to the estate of the said Joel Thompson, deceased."

This deed and contract were drawn by the attorney of the complainant, and she says both were read to her, but that she did not understand them. We are not surprised, in view of what we have quoted from the letters and deed and contract, that the trial judge reached the conclusion he did.

The decree is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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WINEBERG *v.* PORTER.

SALES—FRAUD.

Where plaintiff purchased a horse which he knew was sick, for slightly more than half its value if it had been in good health, and defendants did nothing to deceive or defraud him, the court did not err to plaintiff's prejudice in refusing to charge, in an action to recover back the purchase price after its death, that, if the horse was incurably sick at the time of purchase, plaintiff could recover: it was not incorrect to limit his right of recovery to the issues of fraud and whether he acted on his own judgment.[1]

Error to Chippewa; Oren, J. Submitted November 13, 1912. (Docket No. 24.) Decided July 9, 1913.

Assumpsit in justice's court by Samuel Wineberg against George Porter and Harry Gemmel to recover back the purchase price paid for a horse. From a judgment for plaintiff, defendants appealed to the circuit court. Judgment for defendants. Plaintiff brings error. Affirmed.

F. T. McDonald, for appellant.

John W. Shine, for appellees.

MOORE, J. This was an action of assumpsit brought by plaintiff to recover back money paid to defendants by plaintiff for the purchase price of a sick horse. The case was commenced in justice's court, where a judgment was rendered in favor of the defendants. The case was appealed to the circuit court, where it was tried by a jury, which returned a verdict in favor of defendants. The case is brought here by writ of error.

[1] On the question of the liability of a vendor of diseased live stock, in the absence of express warranty, see note in 29 L. R. A. (N. S.) 202.

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The questions for our consideration grew out of the refusal of the court to give two requests to charge offered by the plaintiff and to his charge as given. The requests to charge are as follows:

"(1) You are instructed that if you find, by a preponderance of the evidence, that the horse which plaintiff purchased of defendants was, at the time of the sale, suffering from a fatal disease, or combination of diseases, which culminated in the animal's death, the plaintiff would be entitled to recover the purchase price paid defendants for the horse, and for expenses for medicine and care in attempting to cure the animal, and for necessary expenses incurred for burial of the same, and cleaning plaintiff's barn of the diseased matter caused by the horse's illness and death. And if you so find, your verdict should be for the plaintiff.

"(2) You are also instructed that, where the seller of property makes a misrepresentation respecting the property he is selling, and the buyer is actually defrauded in the purchase of the same by the misrepresentation, it does not matter whether the seller was innocent of any intentional fraud or misrepresentation, the buyer would be entitled to recover of the seller the amount paid for the property. And if you should find in this case that the horse in question was represented by the defendants, or either of them, at the time of the sale to have merely a cold in the head, and that, as a matter of fact, it was suffering from a complication of diseases, the plaintiff would be entitled to recover, even though the defendants made the representations innocently and without any intentional fraud."

The parts of the charge to which exceptions are taken are as follows:

"With respect to this claim of the plaintiff I would say to you that I don't think he would be entitled to recover in this case unless he has been able to prove, and prove to your satisfaction, that he was induced to make this purchase by reason of actual fraud, actual false and fraudulent representations made by the defendants to him, whereby he was deceived into making this purchase. * * *

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"Now I would say to you, gentlemen, that you must find in this case, in order to entitle the plaintiff to recover, that this was a case of actual deception practiced upon him upon the part of the defendants, and it must appear to you that he acted upon these alleged deceptive or false statements. If the plaintiff, in making the purchase, acted upon his own judgment, upon his own idea that he would be able to effect a cure of that horse, and made the purchase knowing, as it is admitted he did know, that the horse was sick, that he did not himself do what he had an opportunity to do, call in a veterinary to determine the actual condition, but relied solely upon his own judgment, his own expectations that he might be able to effect a cure, then it could not be said that he had been deceived by these representations. And, as I have just stated, unless you find that it was a case of actual deception, that this man was actually deceived to his undoing in this case, he could not be held entitled to recover. * * *

"Now, if you find in this case that such were the facts, that this man knew the condition of the horse beforehand, and bought merely for the purpose of speculation, and of intending to take his chances upon his ability to cure and thereby secure to himself a valuable horse, you should find in the defendants' behalf, as I don't think a recovery could properly be predicated upon a state of facts such as I have last detailed.

"Plaintiff's counsel has asked me to charge in effect, that as long as this horse was afflicted with an incurable disease at the time of the purchase, that that fact would render the purchase void, and would entitle the plaintiff to recovery. I do not believe that such is the law in this case, gentlemen of the jury. I think that if this plaintiff, knowing the condition, and not being deceived in any respect by any acts or representations, or any references upon the part of the defendants, bought, with his eyes open, speculating, taking his chances upon his ability to cure the horse, the purchase was absolute and could not be rescinded."

The record discloses that the plaintiff was a man of mature years and had considerable experience in buying and selling horses. The defendants, for about two

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months, had been in the habit of buying horses in Chicago and selling them in northern Michigan. Shortly before the transaction which gave rise to this litigation, they bought 12 horses and put them in the stable of the Fountain House at Sault Ste. Marie, and offered them for sale. Among them was a mare for which they paid $130 in Chicago. The plaintiff says they offered to sell him this horse for $150. This horse was taken sick. The plaintiff testified as follows:

"He [Mr. Gemmel] showed me the same horse he showed me on the 12th, and I says, 'I will buy that horse providing you will sell it cheap enough.' First, on the 12th of March he wanted $150 for the horse, and the next time he came down to $100. It was a chestnut mare.

"*Q.* What was said and done between you?

"*A.* Well, I says, 'I won't give you $100; I will give you $75, because I have no horse to work.' 'Why,' he says, 'I won't take $75, too little,' and finally I hung around there, and he talked and talked until he closed at $82.50 for the horse, and I had $22.50 in my pocket, and I says, 'Come into the bank, and I will give you the balance of the money;' so I went into the bank and drew $60 more and give him. I don't know where Porter was during this time. I never saw him at all. He was around tending to the horses or something. He didn't come near and hear the bargain. The horse was right there in the stall.

"*Q.* What was said, if anything, by Mr. Gemmel, about the horse having a cold?

"*A.* First, when I stopped to see the horse, that was on the 14th day of March, the horse had some cracked corn and some hay in the manger, and I says, 'What is the matter, the horse don't eat?' 'Why,' he says, 'he has a heavy cold in his head, but if he gets into a new barn and gets a few bran mashes he will be all right;' and I bought on the condition that he had a cold in his head, and I bought the horse and took him home.

"*Q.* What did you do with him?

"*A.* Put him in the barn, and put three blankets on

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him, first thing, and I went in the house and got some hot water, and took some bran and gave him a hot mash—poured it into the box in the manger, and the mare would not look at it."

Later in the day he took the mare out on the street and she got down on the ice and in the snow and slush. After he got her home he called a veterinary and she got steadily worse, dying March 18th. She was purchased March 14th. Plaintiff claims the mare had something more than a cold when he bought her, and that she was fatally ill, and because of that he should have the purchase money back.

It is the claim of defendants that they paid $130 for this mare in Chicago; that they offered her for sale for $150 at Sault Ste. Marie before she became sick, and that after she took cold she was sold to plaintiff as a sick horse for $82.50, he knowing as much about her condition as they did. On the cross-examination, the plaintiff stated, among other things:

"*Q.* You say now that when you first saw him, on the 12th, he asked you $150?

"*A.* Yes, sir.

"*Q.* Now, you knew $150 was too much, did you?

"*A.* Why, I didn't know nothing about it.

"*Q.* Well, after buying the horse when Mr. Gemmel suggested to you some way you ought to treat the horse, didn't you tell them that you knew more about a horse than they did?

"*A.* I didn't tell them no such thing, that I knew more about a horse than they did.

"*Q.* What did you say?

"*A.* I says, for a bluff, that I knew more about horses than they did. I told you that in justice's court.

"*Q.* But didn't you tell him at the time that he sold you the horse?

"*A.* No, sir.

"*Q.* When did you tell him that the first time?

"*A.* Oh, I don't know. I think Mr. Porter was in my store one day.

"*Q.* You didn't tell him over at the barn when they

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were undertaking to tell you how to treat the horse?

"*A.* No, sir; only they told me to take him home and give him a few hot bran mashes; that is the only reason I bought the mare, and it would be all right.

"*Q.* Didn't you say that you had been in a stable that had 150 horses—

"*A.* I said it same as I said that bluff.

"*Q.* When did you say that?

"*A.* On the 12th day of March.

"*Q.* That was while you were at the barn, was it?

"*A.* Yes, sir.

"*Q.* Well, what were they saying to you then, that they gave you a bluff?

"*A.* Didn't say nothing; just talking about horses; Lavines was in there, and just chewing the rag—didn't talk nothing about buying horses, or anything of that kind.

"*Q.* How did you come to tell these defendants that you knew more about horses than they did?

"*A.* I don't remember telling the defendant. I was talking to quite a few of them, that was in the barn chewing the rag, but didn't tell the defendants any more than the rest.

"*Q.* Do you mean to say that you told the whole crowd that you knew more than they did?

"*A.* Yes, I divided the whole crowd with it.

"*Q.* You say you were only bluffing?

"*A.* Yes, sir.

"*Q.* What did you expect to gain by bluffing?

"*A.* Didn't expect to gain nothing, only I gave him the bluff.

"*Q.* What for?

"*A.* Oh, I don't know, only I just cut in that way."

One witness testified, among other things, as follows:

"*A.* Well, he offered him $75, and Mr. Gemmel wanted $100, and at last he says, 'I will tell you what I will do with you. If you want the mare I will let you have her for $90;' and Mr. Wineberg says, 'I will tell you what I will do. I will give you $80;' and at last Mr. Gemmel says, 'I will take $85, being as it is a cash deal, and we have a lot of horses on hand.' And then I saw there was only $5 difference between them,

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and I says, 'Split the difference, you fellows;' and so they did split the $5 between them. Then I says, 'Split the difference and make it $82.50,' and they did. Wineberg said, 'Well, all right, $2.50 don't cut much figure either way.' He didn't say anything at that time, but at the time he made the offer of $80, he said, 'I will give you $80, and I don't give a damn if she dies tomorrow, I will take chances on her.' "

The record is clear that plaintiff bought a horse that, if well, would have been worth $150 or more. When he bought he knew it was sick. The defendants told him it had a cold. He did not pursue the inquiry further. There is nothing to indicate that defendants withheld anything from him about which they were asked, nor is there anything to challenge their good faith in the transaction. Under the facts disclosed by this record the court did not err in his charge or in his refusal to give the requests to charge.

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

WALKER *v.* SCHULTZ.

Error to Ingham; Wiest, J. Submitted November 19, 1912. (Docket No. 114.) Decided July 9, 1913.

Ejectment by Jennie B. Walker against Eva May Schultz. Judgment for defendant, and plaintiff brings error. Reversed, and new trial ordered.

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Charles H. Chase (Edwin H. Lyon, of counsel), for appellant.

Raudabaugh & Person, for appellee.

MOORE, J. This action, brought to this court by writ of error, is one of ejectment to recover 17 lots of the Charles Kudner subdivision, etc., in the city of Lansing, Mich. Plaintiff claims to be the owner in fee. The subject-matter in this suit is involved as a part of the subject-matter of a suit brought here on appeal from the circuit court for the county of Ingham, in chancery, entitled *Jennie B. Walker, et al.* v. *Eva May Schultz, et al.* Plaintiff, believing that she could not successfully prosecute her claim and try her title in chancery as against defendant, who was in possession and claimed the right of possession, brought this ejectment suit. An opinion was handed down in the chancery case in May. *Walker* v. *Schultz,* 175 Mich. 280 (141 N. W. 543). A reference to that opinion will make any further statement of facts unnecessary. It is controlling of this case.

Judgment is reversed, and new trial ordered.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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WALLACE *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. CARRIERS—BAGGAGE—STORAGE—REASONABLE TIME.
   A passenger, bringing action for loss of her baggage by fire, is entitled to show that she did not have a reasonable opportunity, after arriving at her destination, to procure it, and, without averments as to the particular facts in her declaration, which contains the general averment that plaintiff did not have a reasonable opportunity, may show that she attempted to get it, and was informed by the baggage man that he could not then attend to it, and that he closed and locked the station before she could find a conveyance to deliver the baggage.

2. SAME—INSURER OF BAGGAGE—REASONABLE TIME.
   The strict rule of liability for baggage of passengers continues after arrival of the passenger at his destination and until the lapse of a reasonable time thereafter: what is a reasonable time is a question of fact for the jury if there is any dispute about the facts.[1].

3. SAME—ACT OF GOD—LIGHTNING—BURDEN OF PROOF.
   Since the contention of a carrier that loss of plaintiff's baggage by fire was occasioned by lightning is an affirmative defense, the court properly denied a new trial on the question of the weight of evidence, upon conflicting testimony that would support a finding for either party.

Error to Kent; McDonald, J. Submitted November 11, 1912. (Docket No. 23.) Decided July 9, 1913.

Case by Veva C. Wallace against the Detroit, Grand Haven & Milwaukee Railway Company for the destruction of plaintiff's baggage. Judgment for plaintiff. Defendant brings error. Affirmed.

[1] As to the termination of a carrier's liability for baggage, see note in 3 L. R. A. (N. S.) 183. And upon the liability for baggage after reaching destination of passenger, see notes in 36 L. R. A. 781 and 38 L. R. A. (N. S.) 383.

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Harrison Geer, for appellant.

Lombard, Hext & Washburn, for appellee.

MCALVAY, J. This is a suit brought by plaintiff in her own behalf and as assignee of her husband, to recover, in an action of trespass on the case, compensation from defendant transportation company for baggage belonging to them which, while in its depot at a station named Ada, was consumed by fire at about 1:30 o'clock on the morning of August 23, 1910. The property for which recovery was sought consisted of a trunk, two suit cases, and the contents thereof.

Upon the day in question plaintiff, her husband, and daughter, who had lived at the village of Saranac, Mich., for some time, were changing their residence from that place to Peru, Ind., where they intended to make their future home, and they desired before leaving to visit a brother of plaintiff's husband at Ada, Mich. On the afternoon of August 22, 1910, Mr. Wallace, the husband of plaintiff, intending to take passage upon defendant's train, purchased from defendant's agent at Saranac three tickets for Ada. He checked for that point a trunk and two suit cases as baggage, and received the checks therefor. They took passage from Saranac upon a passenger train of defendant due at Ada about 4:30 p. m., which, on the day in question, did not arrive there until after 6 o'clock. There is a dispute as to the exact time. The testimony varies between 6:15 and 6:45 p. m. The station is at or near a small village on the defendant's road, and at this time was open only from 6 a. m. to 7 p. m. It was in sole charge of the agent of defendant, one Mr. McLeod, who was acquainted with plaintiff and her husband. There was no dray line at this depot nor other public means for the conveyance of baggage away from it. Upon the arrival of the train, plaintiff and her hus-

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band went at once into the waiting room of the depot, in company with the station agent. There is a dispute as to what occurred.

Plaintiff and her husband claim that the checks were produced and presented to the agent for the purpose of claiming the baggage, whereupon defendant's agent said he could not bother with the baggage at that time because he was in a hurry to get his supper and to return for the next train from the west. Defendant's agent denied that this conversation occurred. It was claimed and testified to by plaintiff and her husband that the agent then requested Mr. Wallace to assist him in putting the trunk into the waiting room of the depot, and that he did so. The two suit cases were put into the ticket office by the agent; there being no baggage room in the depot.

After this, Mr. and Mrs. Wallace and their daughter, with the agent, McLeod, started for the house of William Wallace, about 40 rods from the depot by the road, but only about 15 rods on a direct line, where the plaintiff at once asked Mr. Wallace if she could get a conveyance to bring their baggage from the depot. He said it was impossible to do so until after supper as all the horses were out. Some time elapsed before the supper was ready, and the agent was obliged to return to the depot before supper in order to meet the train due from the west at about 7 o'clock. After the departure of that train he closed the depot for the night and returned to the house about the time they were finishing their supper. Plaintiff's husband testified that the agent said, "that the station was closed for the night, and that he did not have to go back." About the hour of 1:30 in the morning fire broke out in this depot, and, as stated, it was consumed with its contents.

The case was tried before the circuit court for Kent county. At the close of the testimony, defendant

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moved for a directed verdict, on the ground that the relation of carrier had ceased as to this baggage, and that defendant was a warehouseman liable only for negligence. This motion was denied, and the case was submitted to the jury, which rendered a verdict for the amount claimed by plaintiff, upon which judgment was duly entered.

Defendant has brought the case to this court for review, and the errors assigned and relied upon by defendant are:

First. Upon permitting plaintiff to answer the following question:

"*Q.* What was said with reference to the baggage at that time?"

Second. That the trial judge erred in refusing to charge the jury that the relation of carrier to this baggage had ceased, and that the defendant was a warehouseman, liable only for negligence.

Third. Upon the refusal of the court to grant a new trial on the ground that the verdict was against the weight of the evidence.

These errors assigned will be considered in the order presented by appellant:

First. The objection to this question was on the ground that this testimony was not within the allegations of the declaration. The declaration alleged, among other things, that it was the duty of defendant to safely keep said baggage in said station for such reasonable time as would afford a reasonable opportunity to plaintiff to procure it; that plaintiff had no reasonable opportunity to secure and remove this baggage, placed in the depot before it was destroyed by fire.

The theory of plaintiff was, and the testimony offered by her tended to show, that when these parties arrived at the station at Ada, this baggage was taken out of the baggage car and placed upon the platform; that she, in company with her husband and the station

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agent, went into the station, presented the three checks for this baggage, saying in the agent's presence, "Here are the checks;" that the agent declared he had no time to bother with the baggage, as he must get to his supper and return in time for the train from the west; and that he then asked plaintiff's husband to assist him in carrying the trunk into the station, which was done, and the two suit cases were placed in the ticket office by the agent; that the agent at once went with these parties to the house of Mr. Wallace's brother for supper, where this agent boarded; that before supper was ready this agent returned to the depot to meet the train from the west; that after this train had gone he locked up the depot for the night and returned to get his supper, arriving at his boarding place when the plaintiff and her husband were finishing their meal. This testimony was offered by plaintiff as a circumstance tending to show the fact that she had no reasonable opportunity to get this baggage.

The rule is well settled that matters of evidence need not be pleaded. This is not an action for damages caused by the negligent acts of defendant's agents, and the rule in such cases that the specific acts of negligence relied upon for recovery must be pleaded does not apply. In our opinion it was material and admissible, and no error was committed by the trial court in permitting plaintiff to answer this question.

Second. Appellant next contends that defendant was in possession of the baggage in question as a warehouseman and not as a common carrier at the time of the fire. The law is well settled that the strict rule of liability of a common carrier of passengers for their baggage continues, after the arrival at the destination of the passenger, until the lapse of a reasonable time for delivery; and after such time has elapsed that the liability of such common carrier is that of a warehouseman. 3 Am. & Eng. Enc. Law (2d Ed.),

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p. 564, and cases cited. The Am. & Eng. Enc. Law (2d Ed.), vol. 3, p. 565, says:

"The troublesome question in this connection is as to what constitutes such reasonable time, and must be determined from all the circumstances of the case, such as the character of the station, the facilities there for receiving baggage, and the opportunities afforded by the carrier for delivering baggage when called for."

The law is also well settled by the weight of authority that, where there arises a dispute upon the facts, the question of reasonable time is one of fact to be submitted to the jury. 3 Am. & Eng. Enc. Law (2d Ed.), p. 565, notes and cases cited. The facts in this case are in dispute. Testimony on the part of plaintiff was introduced tending to show the facts just stated in the preceding paragraph, and, further, that she was told at the depot that there was no public dray or means to get this baggage away from the depot; that she and her husband desired to take it away, and that they went to his brother's where they asked for and sought a conveyance, but could not get it until later; that afterwards defendant's agent locked up the depot for the night, and the fire occurred shortly after midnight. Some of the testimony of plaintiff upon this contention was disputed by defendant's agent. We are satisfied that under the circumstances the action of the learned circuit judge in submitting this question of reasonable time to the jury was not erroneous, and was as favorable to appellant as could be demanded or expected. The jury has found as a fact that plaintiff and her husband were not afforded a reasonable time and opportunity in which to secure and remove this baggage, thereby determining the status of defendant towards these goods at the time they were destroyed by fire as that of a common carrier.

There remains but one question for consideration, and that is whether the court was in error in refusing

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to set aside the verdict of the jury on the ground that it was contrary to the clear weight of the evidence in the case. Stated in another way, appellant's contention is that the weight of the evidence was overwhelming that the fire which destroyed these goods was caused by the act of God, namely, lightning. Appellant admits that the trial court correctly charged the jury upon the law of this question. It is admitted by both parties that if the fire which destroyed these goods was caused by lightning the plaintiff cannot recover.

The contention that these damages were so caused is a mater of affirmative defense, the burden of proof to establish which being upon the defendant, and, like the affirmative of any issue of fact, it is required to be established by a preponderance of the evidence.

This assignment of error places upon the court the necessity of a thorough and careful examination of all the evidence in the case bearing upon it. Such examination discloses a condition of contradictory testimony, a statement and analysis of which would be of no benefit to the profession. This was admittedly a question of fact for the jury, which, under proper instructions, was submitted to and acted upon by it. Our conclusion is that its determination was not against the weight of the evidence, and that the court was not in error in denying the motion for a new trial.

The judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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FULLER v. DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—PLACE OF ALIGHTING—NEGLIGENCE—STREETS.
In selecting a place for passengers to alight, a street railway is bound to exercise reasonable care to stop the car at a safe place, and is liable if a passenger is required to alight at a point in a street where a sufficient defect or depression exists to render it unsafe[1]

2. SAME.
But a worn place in the pavement, not over three inches in depth and twelve inches in area, in which plaintiff fell, spraining her ankle, was not such a dangerous place as to charge defendant with liability for stopping the car and requiring plaintiff to alight at a point about one pace distant.

Error to Wayne; Hosmer, J. Submitted November 21, 1912. (Docket No. 151.) Decided July 9, 1913.

Case by Jessie Fuller against the Detroit United Railway for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Sloman & Sloman, for appellant.

Corliss, Leete & Joslyn (Frederic T. Harward, of counsel), for appellee.

BIRD, J. The plaintiff began this suit to recover damages for injuries suffered by her in consequence of the failure of the defendant to provide a safe place for her to alight from a car on which she was riding on the afternoon of November 4, 1909, in the city of Detroit. She was a passenger on a Trumbull avenue

[1] The question of the liability of a street railway company for stopping car at improper place for passenger to alight is treated in a note in 16 L. R. A. (N. S.) 467.

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car, and when it made its regular stop at the corner of Congress street and Woodward avenue she passed out of the car and down the steps to the pavement. In taking the first step away from the car toward the curb, she stepped with her right foot into a depression in the pavement and in so doing struck her foot against the corner of a manhole cover, turning her ankle and causing a severe sprain. The area of the depression was 12 inches by 12 inches and its maximum depth was 3 inches. When the testimony was completed, it was the opinion of the trial court that plaintiff had made no case for the consideration of a jury, and it therefore directed a verdict for the defendant. The plaintiff assigns error upon the refusal of the trial court to submit to the jury the question as to whether the place was a safe one.

The degree of care to be exercised by a street railway company in selecting a place for its passengers to alight was clearly defined in the case of *Spangler* v. *Traction Co.*, 152 Mich. 405 (116 N. W. 373), where it was said:

"Ordinarily a passenger, having safely alighted from a street car, becomes at once a traveler upon the highway, and his duty and the duty of others towards him have no relation to the reciprocal duties which a moment before existed between the carrier and himself. *Creamer* v. *Railway Co.*, 156 Mass. 320 ([31 N. E. 391] 16 L. R. A. 490 [32 Am. St. Rep. 456]); *Bigelow* v. *Railway Co.*, 161 Mass. 393 [37 N. E. 367]; *Conway* v. *Railroad Co.*, 87 Me. 283 [32 Atl. 901]; *Id.*, 90 Me. 199 [38 Atl. 110]; *Platt* v. *Railroad Co.*, 2 Hun (N. Y.), 124. But as a general rule it is the duty of the street-railroad carrier to at least exercise proper care to see that the place of alighting is safe—not to stop a car for alighting passengers at a place known to be unsafe."

There would seem to be little doubt that the defect complained of in this case was situate near enough to defendant's track to make it an alighting place and to

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render the defendant liable if it can be said that the place was an unsafe one.

The important question, therefore, arises as to whether the place where plaintiff was invited to alight was a safe one. It is a well-known fact most pavements have more or less depression worn into them by the passing traffic, and it is equally well known that they cannot be kept as even and smooth as a sidewalk by reason of the use which is made of them. Pavements are not especially designed for the use of pedestrians, and, when they are used by them, it must be done with these differences in mind. Many pavements with such depressions are in daily use in our cities by pedestrians and vehicles with no thought of their being unsafe, and they are not unsafe to one who is in the exercise of ordinary care. The place where the car stopped was not, in our opinion, an unsafe place for the landing of passengers.

As the case was disposed of by the trial court in conformity with this view, the judgment will be affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

In re SHANAHAN'S ESTATE.

SHANAHAN *v.* MERRICK.

1. EVIDENCE—ADMISSIONS—EXECUTION.

Admissions claimed to have been made by the executors and proponents of a will, who, with others, were legatees under it, are inadmissible to prove undue influence.

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2. SAME—UNDUE INFLUENCE—WILLS.

Evidence, *held*, to be insufficient to require submission to the jury of alleged undue influence.

Error to St. Clair; Beach, J. Submitted October 16, 1912. (Docket No. 34.) Decided July 9, 1913.

Edmund Shanahan presented for probate the will of Maurrice C. Shanahan, deceased. From an order admitting the instrument to probate, Margaret Merrick and others, contestants, appealed to the circuit court, where the will was sustained. Contestants bring error. Affirmed.

Frank R. Schell (Lincoln Avery, of counsel), for appellants.

Walsh & Walsh, for appellees.

MOORE, J. This is a will contest. The testator, Maurrice C. Shanahan, executed the will in question November 22, 1904, and died April 15, 1909. The will was allowed in the probate court. An appeal was taken. The case was tried by a jury which found in favor of the will. The case is brought here by writ of error.

We quote from the brief of appellant:

"By the terms of the proposed will the widow has the use and income of the estate during her life. After her death the son Michael is to pay to James Shanahan, Catherine Carroll, Edmund Shanahan, and Ellen Spencer $500 each, and is to erect a monument on the grave of testator, at a cost of $800, and pay funeral bills, doctor bills, and indebtedness, and the residue of the estate is given to Michael Shanahan. The testator left no indebtedness, and there were no doctor bills. Margaret Merrick and Mary Shanahan, Jr., usually called Molly, daughters of testator, and the son, John, who has not been heard from in 39 years, by express terms of the proposed will were to receive nothing. The ages and residences of the children are

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as follows: Catherine Carroll, 56 years old, lives in Columbus township, about four miles from testator's home; Mary Shanahan, Jr., the unmarried daughter, is 54 years old and lives with Robeson's at Port Huron. Edmund Shanahan is 52 years old, and lives about half a mile from testator's home. James Shanahan is 50 years old, and lives at Lambs, about two miles from testator's home. Ellen Spencer, sometimes called Nellie, is 34 years old, and was home winters since her marriage. * * * Michael Shanahan is 43 years old, and lived on the farm with testator * * * after he was married until the summer of 1905, when he built a house right beside James at Lambs, where he still resides. James was married 20 years ago, and prior to that time he lived at home and worked at home summers and worked in the woods winters."

The estate left by Mr. Shanahan is variously estimated to be worth from $4,000 to $6,000, so that it is evident that no large sum will come to the residuary legatee.

The following appears near the close of appellant's brief:

"It needs no comment that contestants are not fighting so much for the value of the property involved as they are fighting for principle, and to prevent the consummation of a great wrong."

Counsel for contestants preferred 67 written requests to charge. These were not given as prepared, but the trial judge sought to cover such of them as were germane in a general charge, covering something more than seven printed pages. He instructed the jury, in effect, that testator was, as a general proposition relating to his mental condition to do business, of sound mind. He also charged them that there was no evidence of undue influence. He left to them one question. We quote from the charge sufficient to show what that was:

"*Ninth.* But the contestants present this other question, and that question is here for your full, fair, de-

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liberate consideration. They allege that there was existing in the mind of Maurrice C. Shanahan, at the date and before the making of the November, 1904, will, a state of feeling against Margaret, which is only explained, as they claim, as the contestants claim, by what they claim to have been facts as to the existence in Maurrice C. Shanahan's mind of a delusion as to statements and acts of Margaret Merrick towards himself. Now, this claim is sharply defined, and is the only issue to be presented to you and for your consideration. The claim made in this respect by the contestants is that the testimony indicates that at the time of the making of the will, and before, there was an intense feeling on the part of Maurrice C. Shanahan toward Margaret. The claim is that that feeling is not accounted for by any testimony here disclosing the relations of the parties, except on the basis that these claimed unfounded feelings existed and were operating in the mind of Maurrice C. Shanahan as to statements made by Margaret, and which had no foundation in fact. That is the claim. Now, as I say, this proposition calls for your careful consideration of all testimony bearing upon this alleged feeling and the alleged statements claimed to have been made by Maurrice C. Shanahan. It is claimed by contestants that the evidence of Ed Shanahan indicates that this feeling existed in its claimed intensity in October preceding the making of this will. You have heard this testimony detailed to you, the statements drawn from Edmund Shanahan as to what Maurrice stated in relation to Margaret and Molly, and the reason why he would not include them in the provisions of the will.

"*Tenth.* It is the claim of the proponents at that date there was no explanation and no reason existing for that state of feeling, except the general relations between Maurrice C. Shanahan and his daughter Margaret, going back from that time through all the family history, and that that feeling had originated and been perpetuated by the attitude of the daughter towards the father. On the part of the contestants testimony was introduced of claimed statements made by Maurrice C. Shanahan in 1905 and 1906, following the making of the 1904 will. Now the proposition by the contestants which you are to consider in this re-

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gard is this: That these statments made during the following years after the making of the 1904 will relate back and explain the feeling expressed to Edmund Shanahan in 1904; that they give—those statements give—the reason for the feeling existing at and before the making of the will. Now I say to you gentlemen, that right there is the crucial point for your consideration in this case.

"*Eleventh.* I may say, as preliminary to that, that it is urged here, and is a matter of fact, that these statements claimed to have been made by Maurrice C. Shanahan in 1905 and 1906, or subsequent, rest upon the testimony of interested parties in this litigation. That fact you are to take into consideration in determining, for instance, what weight and credit you will give upon the question as to whether those statements were made as they were detailed before you here in the testimony of these witnesses. The matter of interest in a witness is always a matter for consideration by the jury in determining what weight or credit they will give to any statement made by such witness on the stand.

"*Twelfth.* Now, as I say to you, the crucial question in this case is whether these statements were made as detailed by these witnesses; whether they were made by Maurrice C. Shanahan containing practically the subject of what these witnesses detailed upon the stand as to what they claim existed in Maurrice C. Shanahan's mind in relation to Margaret. Then if you find, as a matter of fact, that they were made substantially as detailed, then the next question naturally would be, do they relate back and explain the condition of mind of Maurrice C. Shanahan in 1904, when he made his will. Have they any connection with the condition of his mind at that time and the statements made to Edmund Shanahan.

"*Thirteenth.* There is no direct testimony in this case that they so related, but the court has deemed it sufficient to go to you from the fact that it is claimed that some of these statements were made in the summer of 1905, some months after the making of the will.

"*Fourteenth.* Now if you should find, as a matter of fact, that these statements do relate back and explain

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the condition of mind in 1904 at the time of the making of the will of Maurrice C. Shanahan, then the question remains, and is the sharp, decisive question in the case.

"*Fifteenth.* Did that state of mind exist and prevail to the extent that Maurrice C. Shanahan was insanely deluded upon that question; deluded to the extent that he could not be reasoned with as to whether the facts which he stated were true or untrue? Did he firmly believe them, and were they without foundation in fact? And I may say to you that it is conceded here as a fact in this case that, if those statements were made, they had no foundation in fact.

"*Sixteenth.* But the critical question there is, Did they exist in his mind and actuate his conduct in the making of the will, overshadowing all other questions of differences between himself and Margaret, and actuated and dictated the provisions of the will which disinherited her? And did they exist in that intensity so his mind was perverted by this delusion in relation to these unfounded charges, that they prevailed over every other consideration, and drove him, in that deluded state of mind, to exclude Margaret from his will? In other words, was he a monomaniac on the subject of Margaret's attacks upon him? Did he believe that she had so attacked him; that she had so insulted him; that she had so misbehaved towards him; did he firmly believe it, and did it exist to that extent that he was a monomaniac upon that subject? If you so find, gentlemen of the jury, that fact in itself, in its entirety—that state of mind—would avoid this will, and your verdict should be that this is not the true will of Maurrice C. Shanahan. But if they did not exist to that extent that they completely dominated his mind in making these provisions in excluding Margaret, if other reasons existed in his mind dating back through all the family history that influenced him, if the relation of this father and this daughter had been such that there always prevailed in his mind a disagreement on his part towards her, or feeling towards her, no matter whether founded or unfounded in fact, if it existed in his mind, not to the extent of a delusion, then he had the right and the mental capacity to make this will as he made it."

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He then explained to them the legal definition of monomania, or a delusion of this character.

The important question in the case is whether the court erred in not submitting the question of undue influence to the jury. We have read the long brief of counsel with a good deal of care, and looked in vain for the citation of some competent evidence indicating that the will of the testator was overcome by the will of somebody else. We have also searched the long record with the same result. See *Leffingwell* v. *Bettinghouse*, 151 Mich. 513 (115 N. W. 731); *Clark* v. *Ulrich*, 153 Mich. 695 (117 N. W. 329); *In re Provin's Estate*, 161 Mich. 28 (125 N. W. 743); *In re Shepard's Estate*, 161 Mich. 441 (126 N. W. 640); *In re Du Bois' Estate*, 164 Mich. 8 (128 N. W. 1092).

It is the claim of contestants that the statements of Michael and Edmund Shanahan should have been received as bearing upon the question of undue influence. We quote from the brief:

"Edmund Shanahan is named as one of the executors in the will. He signed the petition for probate of the will. He is a proponent thereof. * * * The statements and declarations of a proponent of a will are admissible in evidence. *In re Loree's Estate*, 158 Mich. 372 (122 N. W. 623); *In re Hewitt's Estate*, 161 Mich. 536 (126 N. W. 848, 21 Am. & Eng. Ann. Cas. 47).

"(A) Michael, being named in the will as one of the executors thereof with Edmund, was in duty bound to present it for probate. The statute expressly so provides. Section 9275, 3 Comp. Laws. Hence in law Michael was a proponent of the will as much as Edmund. See Chatterton's Probate Law, §§ 360-362.

"(B) Mike could not evade this law, nor take advantage of that rule of evidence by not signing the petition to probate that will, and leaving it to be signed by Edmund alone.

"(C) It is not the petition alone for probate of a will, but the statute which makes it the duty of execu-

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tors nominated in the will to probate it, that gives those persons the character of proponent."

A reference to the cases cited will show they are distinguishable. Michael and Edmund Shanahan did not cease to be legatees any of the time. There were also other legatees. The authorities are against the contention of contestants. See *O'Connor* v. *Madison*, 98 Mich. 183 (57 N. W. 105); *In re Estate of Lefevre*, 102 Mich. 568 (61 N. W. 3); *Roberts* v. *Bidwell*, 136 Mich. 191 (98 N. W. 1000); *In re Ganun's Estate*, 174 Mich. 286 (140 N. W. 561).

The other questions presented by counsel have been considered, but we do not deem it necessary to discuss them. The case was carefully tried, and we find no reversible error.

The judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

GEORGE *v.* ROLLINS.

1. EQUITY—JURISDICTION—VALUE OR AMOUNT IN CONTROVERSY.
   Where the fact that the amount in controversy does not appear, from averments of the bill, to exceed $100, the proper practice is not to demur, since the defect is not fatal, but to raise the jurisdictional question by plea or answer, although it may be raised at the hearing, if it should appear from pleadings and proofs that the value or amount does not equal the required minimum.

2. SAME—ADEQUATE REMEDY AT LAW—CONTRACTS—TRADE NAMES.
   Complainant's bill, alleging that he sold a fur business to

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defendants, to be conducted by a corporation to be formed thereafter, under the name of "The House of George," which was a valuable trade name, that it was stipulated in the contract of sale that complainant should be entitled, on 60 days' notice, to require defendants to cease using the said name, that he had served notice but defendants refused to comply with the contract, and, for the purpose of evading the conditions of the agreement, had conspired together to form a corporation to use the name aforesaid, sufficiently averred facts entitling complainant to relief in equity, and was not demurrable for failure to show that the value in controversy was $100 or upwards, or for the reason that there was an adequate remedy at law.

3. CONTRACTS—TRADE NAMES—INJUNCTION.

Where complainant made a sale of his retail fur business, under contract to discontinue the use of his name on request and 60 days' notice, defendants were not entitled to dissolve the original corporation doing business under complainant's name, and organize another to continue the business and adopt the name: the attempted evasion of the terms of the agreement was fraudulent and should be enjoined.

Appeal from Wayne; Hosmer, J. Submitted January 13, 1913. (Docket No. 76.) Decided July 9, 1913.

Bill by Edwin S. George against Fred H. Rollins and others to restrain the use of a trade name. From an order overruling a demurrer, defendants appeal. Affirmed.

Lucking, Emmons & Helfman, for complainant.

Allan P. Cox, for defendants.

MCALVAY, J. Defendants have appealed from an order of the circuit court for the county of Wayne, in chancery, overruling their demurrer to complainant's bill of complaint.

Complainant, in his bill as amended, alleged under oath that prior to December 7, 1909, he had been en-

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gaged for some years in business in the city of Detroit and had, by his integrity, industry, and ability, acquired a standing and reputation in business and with the general public which is a valuable asset to him; that among other enterprises he had successfully conducted a retail business under the name of "The House of George," which was unincorporated, and his sole and individual business; that on the date above named complainant entered into a written contract with the defendants Fred H. Rollins and Josephine Cohen, whereby he sold to them and they purchased said fur business, partly for cash and the balance in deferred payments, to be secured by their shares of the capital stock in the corporation, which was to be formed and to be known as "The House of George" so long as complainant should retain his interest therein, and for a period of 10 years thereafter, subject to complainant's right—

"To demand in writing that the corporation shall so change its name as to eliminate therefrom the name 'George' within sixty days after the date of such notice, whereupon it is agreed that by appropriate action the name of said corporation shall be so changed."

The contract referred to is too long to quote in full in this opinion, and the only part of it material is that which relates to the right reserved by complainant upon notice to require the elimination of the name "George" from the business of the corporation.

Complainant alleges that the corporation was formed contemporaneously with the execution of the contract, and that on June 28, 1911, at a meeting of all the stockholders, the contract was ratified, confirmed, and adopted by the corporation, and it agreed to fully carry out its terms; that soon thereafter defendants Rollins and Cohen, above named, paid complainant in full for his entire interest, and he retired from the

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business; that since July 1, 1911, he has been annoyed, almost daily, by receiving letters, invoices, bills, statements of account, and general correspondence, all pertaining to this fur business, conducted under the said corporate name of "The House of George," and great confusion has resulted therefrom; that the name "George" has no special connection with the fur business, but it is valuable thereto solely because of the reputation built up in such business by complainant; that on August 1, 1911, he gave defendants written notice, as provided in the contract between the parties, to eliminate the name "George" from the business and corporate name, but that defendants have refused so to do. Complainant charges, on information and belief, that defendants Fred H. Rollins and Josephine Cohen, conspiring together for the purpose of evading the provisions of said contract, for the purpose of continuing the use of the name "George" in said business, and of defrauding him and the public in continuing the same business, have caused the said corporation, The House of George, to be dissolved and a new corporation to be organized having the same name and the same total amount of stock, of which the two defendants above named own all but three shares; that the other three shares are held by Lillian Rollins, sister of defendant Rollins, Jeannette R. Cohen, sister of defendant Josephine Cohen, and George Harland; that these three persons have no real interest in the corporation, but are mere dummies for defendants Rollins and Cohen; that all of said actions and doings are in violation of the contract, and in derogation of the rights of complainant, and will cause complainant great loss and irreparable damage, remediable only in a court of equity.

The prayer of the bill of complaint, besides the ordinary prayer asking for an answer, prays for a temporary injunction against them from further pro-

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ceeding with the organization of the corporation to be known as "The House of George," or from doing any other thing in any wise connected therewith, and from conducting or operating the said retail fur business in the city of Detroit, or elsewhere, under the name of "The House of George," or using the name "George" in connection with said fur business, or conducting it in any manner other than set forth in said contract; and that defendants, and each of them, be decreed to specifically perform the provisions of the contract; that a subpœna and injunction issue, and for general relief. A temporary injunction was issued upon filing the bill. Defendants appeared and demurred to the bill of complaint for the following reasons:

(1) Because it fails to show that there is a sufficient amount of money involved to give the court jurisdiction; (2) because there is no equity in the bill of complaint; (3) because the complainant has a complete and adequate remedy at law; (4) because it shows that defendants Fred H. Rollins and Josephine Cohen have fully performed the contract.

The appellants have included in the record the temporary injunction, the motion to dissolve the same, and affidavits in support of said motion. This motion has not been argued, therefore this portion of the record will be treated as surplusage. The demurrer of defendants admits as true all of the allegations of the bill of complaint which are well pleaded. The second and fourth grounds for demurrer do not require consideration.

The first contention relied upon by defendants in their demurrer is the statutory provision relative to the jurisdiction of circuit courts in chancery. This court has held that the statute does not make the allegation of the amount in dispute jurisdictional; and, where the fact that the amount in dispute does not exceed $100 is not shown by the bill, the remedy of

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the defendant is not to demur, but to raise the jurisdictional question by plea or answer, though he may insist on the objection at the hearing, where it appears from the pleadings or proofs that the value in controversy is below the statutory amount. The court said:

"In the present case there was nothing in the bill to show what the amount in controversy was. The defendant did not plead the inadequacy of the amount in controversy. Hence there was nothing to warrant a dismissal under the terms of the statute, and the court should not have made such an order, upon that ground, until the proofs showed such inadequacy." *Brassington* v. *Waldron*, 143 Mich. 364, 365 (107 N. W. 100), and cases cited.

The bill of complaint under oath alleges that the violation of the terms of the contract as charged will cause him great loss and irreparable damage. It also sets forth an invasion and injury of his contract rights, his name, business reputation and standing; that defendants are deliberately violating their contract obligation. The violation of the contract obligations is admitted by the demurrer. The court will not assume that this controversy to protect the rights of complainant in the enjoyment of his property above designated does not involve more than the sum of $100. Property rights are involved in this litigation, which the court will assume to be valuable, and the invasion of such rights is sought to be prevented by injunction.

The contention that complainant has a complete and adequate remedy at law cannot be maintained. This is a controversy where an award of damages would not be adequate, and the bill states an equitable cause of action. It charges a deliberate violation of contract obligations; it shows confusion and misunderstanding, annoyance by the continued use of his name, brought about by the defendants, and an undertaking to avoid a solemn agreement by the subterfuge of organizing

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another corporation of the same name, which they have contracted not to use. This contract complainant has a right to specifically enforce, which enforcement is only possible in a court of equity. These propositions are so fundamental, and have been so often sustained by this court, that citation of decisions is not necessary. Defendants urge that the bill of complaint shows that defendants Rollins and Cohen have fully performed the contract on their part. It is presumed that this is because the purchase price of the property mentioned in the contract has been paid. The fact is overlooked that the contract contained the agreement relied upon by complainant that upon notice given the name "George" should be eliminated from the name of the corporation, which answers the argument.

The further claim is made that the new corporation did not assume the obligation of the contract and is not bound thereby; that it appears without dispute that the first corporation by dissolution consummated the performance of the contract and *ipso facto* the name "George" was discontinued by it; that it is dead and all of its contract relations died with it. The bill avers, and the argument of defendants admits, that the first corporation ratified this contract and agreed to perform the same; that the organization of the new corporation is clearly fraudulent and for the purpose of avoiding the obligation of the contract. Courts do not uphold such transactions. Complainant is seeking to enjoin the perpetration of a gross fraud upon him. He has stated a cause for equitable relief. Assuming that what he charges is true, he is entitled to the relief prayed. This argument of defendants is specious, and does not meet the issue presented.

The decree of the circuit court is affirmed, with costs.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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HILL v. ABRAM SMITH & SON.

PLEADING—EVIDENCE—CONTRIBUTORY NEGLIGENCE—INCOMPETENCY.

Proof that plaintiff, in a personal injury action, was mentally defective or incompetent, is inadmissible unless the declaration contains averments sufficient to apprise defendant, his employer, of the claimed condition, although the testimony is offered to negative contributory negligence, and not as a basis for damages.

Error to St. Clair; Tappan, J. Submitted January 8, 1913. (Docket No. 34.) Decided July 9, 1913.

Case by Peter Hill against Abram Smith & Son, a corporation, for personal injuries. Judgment for defendant. Plaintiff brings error. Affirmed.

Dwyer & Dwyer and *C. L. Benedict,* for appellant.

L. W. Goodenough and *Irvin Long,* for appellee.

MCALVAY, J. This is an action brought by plaintiff against defendant, a Michigan corporation, to recover damages for injuries received while employed in and about defendant's sawmill, charged to have been caused by the negligence of defendant. The case was tried before a jury and submitted under a charge of the court. The jury returned a verdict of no cause of action. Plaintiff by writ of error asks for a reversal.

The facts are that defendant, in connection with its business of repairing vessels, operated a small steam sawmill in the village of Algonac, St. Clair county, Mich. This mill is 50 feet long and 35 feet wide and stands on piles above the ground, and in the floor between the tracks of the log carriage is an opening about six inches wide in which the circular saw re-

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volves when ripping lumber. Underneath the saw is an inclined wooden apron upon which the sawdust falls through the opening and is thrown into the center of a pit below it. The saw hangs in this opening, and just below the floor there are joists or timbers about ten inches apart on each side of the saw. From the bottom of the pit to the under side of the joists is about six feet. The height of the piles on which the mill rests is something over three feet. The space under this mill is only inclosed on the south side by the boarding of the mill extending to the ground, and on the north side for about one-half its length by the engine room. The east and west ends are entirely open.

Plaintiff was hired by defendant to wheel sawdust from this pit with a wheelbarrow, using a shovel to handle the sawdust. He began work February 21, 1910, in the morning, and worked that day and worked full time until noon on the 23d without any mishap. He was employed as a common laborer. His claim is that on that day he was told that the mill would not operate in the afternoon. Later he ascertained that the mill was running and returned to his work. He claims that he met the defendant's manager and was told by him to go to work and remove the sawdust from the top of the pile. This is disputed by the manager. He began work again and had removed one wheelbarrow load of sawdust. He returned for a second load, and, in shoveling this sawdust, in some manner his shovel came into contact with the revolving saw, which dragged his hand against it and seriously injured it.

The failure of duty charged in the declaration upon which negligence is predicated is in not furnishing a safe place in which to work, and not instructing plaintiff as to the dangers of the employment.

Plaintiff at the time was a mature man 40 years

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of age. Upon the trial of the case, in his opening statement, counsel for plaintiff stated, among other things:

"Now, Mr. Hill is not a bright man, nor is he what you might call an ordinary bright man."

An objection was interposed on the part of defendant, upon the ground that no foundation had been laid in the declaration, nor any notice given of a claim of mental deficiency in the plaintiff, and therefore the statement would be improper because no evidence could be introduced to support it. Plaintiff's counsel said:

"We are not claiming at this time that we are entitled to recover by reason of this person being an incompetent person, but are claiming that mental incompetency can be shown on the trial to negative contributory negligence."

The court sustained the objection and an exception was taken. Later the same question arose on the examination of a sister of plaintiff, when the following question was asked by his counsel:

"*Q.* As to whether or not he (plaintiff) is weak, mentally."

Objection was made that this was irrelevant and immaterial for the reason that this testimony was inadmissible under the declaration. The court said:

"Do you put this in as a basis of recovery of damages, because he is weak-minded?"

Plaintiff's counsel said that he did not, but that it negatives contributory negligence and any assumption of risk. The objection was sustained and the plaintiff excepted. A motion for a new trial was made, on the ground that the court was in error in excluding this evidence. This motion was denied. The errors assigned in this case present only the one question as to whether the court was in error in making the rulings above stated.

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In the plaintiff's brief it appears that reliance is placed upon the decisions of this court in several cases, notably *Swoboda* v. *Ward,* 40 Mich. 420, 425, to the effect that, in order to show lack of contributory negligence, the age, intelligence, and experience of the plaintiff may be shown, and the jury from such evidence may determine as to whether the danger was understood and appreciated by the injured person, and the argument is made that evidence of his mental weakness is admissible for the same purpose.

Where the declaration in a case alleges the fact that the person injured was a child, testimony as to the age of the child is admissible as bearing upon its ability to comprehend the danger to which it has been exposed; but appellant cites no authority to sustain his contention that, without setting up such claim in the declaration, where an adult brings suit, such proof is admissible. In fact, we are cited to no authority directly in point in this case. The exact question is one of first intention before this court, but in several cases where the same principle is involved this court has indicated the necessity of including in the declaration an averment of facts sufficient to make the proof relevant and material.

Steiler v. *Hart,* 65 Mich. 644 (32 N. W. 875), was a case brought for injuries to a boy 14 years old who operated a stamping machine, where evidence was admitted to show that working upon such a machine made him dizzy. In the opinion reversing the case this court said:

"The court erred in admitting this testimony. No complaint of this kind is set forth in the declaration, and the effect produced upon the plaintiff is not suggested to have had any relation to the accident as the producing cause. It did not tend to prove the perilous nature of the machine, but rather to show that it incapacitated the witness to work upon it, and no claim is made that defendants were notified of the fact that

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plaintiff was made dizzy by working on the machine, and fell far short of showing that the natural effect of the machine was to make any one dizzy who worked upon it. * * * There was no allegation in the declaration which would authorize the introduction of this testimony."

In the later case, *Lindsay* v. *Railway Co.*, 141 Mich. 204 (104 N. W. 656), an action was brought by an incompetent person, by his next friend, in a case of trespass *vi et armis* for injuries received for assault and battery upon him by a conductor of defendant company, in forcibly putting him from a car. The declaration was a simple declaration in trespass *vi et armis*. The court said:

"It was not competent under this declaration to claim or prove damages for aggravation of a mental disorder, and, if plaintiff claimed damages for negligence of the conductor in failing to discern his infirmity, the declaration was not such as to support such claim. * * * It has been held in several cases that such proof is not admissible, and that such damages are not recoverable unless alleged in the declaration"—citing *Thurstin* v. *Luce*, 61 Mich. 298 (28 N. W. 103); *Wilkinson* v. *Spring Works*, 73 Mich. 409 (41 N. W. 490); *Hunter* v. *Village of Durand*, 137 Mich. 53 (100 N. W. 191); *Phippen* v. *Railway Co.*, 110 Mich. 351 (68 N. W. 216).

In our opinion the court was correct in holding in the instant case that:

"The defendant under the declaration filed had a right to assume that the plaintiff came into court as an adult of ordinary intelligence. An adult in charge of machinery is presumed to possess ordinary intelligence and capacity, and when parties come into court claiming that the defendant is negligent for placing an incompetent person in charge of dangerous machinery, or that the servant is excused from negligence because he is mentally incompetent, plaintiff claiming these rights because of incompetency is in duty bound to apprise the defendant of such claims in his declaration."

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The evidence was inadmissible under the declaration in the case. The court was not in error in excluding it, or in refusing to grant a new trial.

The judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

COGSWELL *v.* CITY OF ESCANABA.

MUNICIPAL CORPORATIONS—BILLS AND NOTES—VOTING MACHINES.

Defendant city purchased certain voting machines pursuant to Act No. 217, Pub. Acts 1905 (1 How. Stat. [2d Ed.] §§ 421-425), and issued a certificate of indebtedness, after using the voting machines at an election and finding that they were satisfactory. Interest was paid on the certificate to the assignee or indorsee and the voting machines were retained without objection by the city and used at two elections, and it appeared from the record that the vendor supplied a carton or box to place inside the booth, as required by subsequent statutory enactment. No official action was shown by the city as a basis of defense. *Held*, that the holder of the certificate of indebtedness was entitled to recover, notwithstanding the claim that the issuance of the certificate of indebtedness increased the municipal debt beyond the lawful maximum.

Error to Delta; Flannigan, J. Submitted January 27, 1913. (Docket No. 103.) Decided July 9, 1913.

Assumpsit by Edwin H. Cogswell against the city of Escanaba for an installment of interest upon a certificate of indebtedness. Judgment for plaintiff

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upon a verdict directed by the court. Defendant brings error. Affirmed.

A. H. Ryall and *F. D. Mead*, for appellant.

H. J. Rushton and *Fellows & Chandler*, for appellee.

MOORE, J. This suit was brought to recover an installment of $98 interest on a certificate of indebtedness for the sum of $2,450, delivered to the Abbott Voting Machine Company by the defendant on the 23d day of April, 1907. This certificate was issued in payment of the purchase price of voting machines, pursuant to Act No. 217, Pub. Acts 1905 (1 How. Stat. [2d Ed.] §§ 421-425). The defendant in this suit pleaded the general issue and gave notice, among other things, that the consideration of the contract for the purchase of said voting mtchines, upon which this certificate was issued, had failed because said voting machines were not reliable and did not permit a secret ballot in all cases as required by law; that they were unreliable and untrustworthy; that Act No. 217 of the Public Acts of 1905, under which the contract was made and entered, was unconstitutional; that the plaintiff was not an innocent purchaser of said contract before maturity and was not a bona fide owner of said contract; that the contract was invalid and could not be recovered upon because the indebtedness of the city of Escanaba was thereby increased beyond the statutory limit and because said contract was made in violation of the charter of the city of Escanaba, being chapter 88, 1 Comp. Laws, and the amendments thereto; that no appropriation was made, by ordinance or otherwise, of the amount necessary to pay said certificate in the month of September, 1906, or at any other time.

After the testimony was all in the plaintiff moved for a directed verdict for these reasons:

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(1) That the certificate of indebtedness was a negotiable instrument under the negotiable instrument act, and that the plaintiff having acquired the same before it was due, for value, was the holder thereof in due course and entitled to recover.

(2) It appearing that the certificate was complete and regular upon its face and that the plaintiff, without notice of any infirmity, if there was any, acquired the same before it was due and before its having been dishonored, and for value acquired the same in good faith, and is therefore the holder in due course and entitled to recover the amount due on said certificate.

The trial judge was of the opinion that the case was on all fours with the case of *Darling* v. *City of Manistee*, 166 Mich. 35 (131 N. W. 450), and directed a verdict in favor of the plaintiff. The case is brought here by writ of error.

Considerable space is devoted in the briefs to a discussion of the negotiable instrument law, so called. Discussion is also given to the provisions of Act No. 287, Pub. Acts 1907, and the construction thereof. We do not deem it necessary to discuss whether the instrument sued upon is governed by the negotiable instrument act or not. Nor do we need to discuss the provisions of Act No. 287, Pub. Acts 1907, as that act was not approved until June 27, 1907, while the transaction in the case at bar was entered into April 23, 1907.

There are certain features of the case about which there is no dispute. At the April election, 1907, the city of Escanaba used the Abbott voting machines. Following this election the city issued the bond or certificate sued upon. The city on that date placed an order for seven Abbott voting machines, which order was accepted. The following language occurs in the order:

"Upon the following conditions, and not otherwise: That the Abbott Voting Machine Company guarantee

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each Abbott voting machine to be of perfect material and workmanship; that each machine will, at all elections, keep an absolutely correct record of a vote from each voter voting at the election, and that the number of votes as to each office being voted for shall exactly equal the number of voters as shown by the total register on the machine to have voted; that said company will keep said machines in repair and replace or repair any part or parts which may require repairing or replacing on such machines for a period of ten years from this date without charge to the city of Escanaba; said Abbott Voting Machine Company having furnished competent instructors at the first election, April 1, 1907, without charge to the city of Escanaba.

"The machines having complied with the abovementioned conditions at the election held April 1, 1907, the city of Escanaba hereby agrees to issue and deliver to the said Abbott Voting Machine Company, its certificate of indebtedness for the sum of three hundred and fifty dollars for each voting machine, and payable at the time above specified."

The record shows that on May 18, 1907, the plaintiff loaned the Abbott Voting Machine Company $2,000, taking its note therefor and the certificate sued upon, duly indorsed as collateral security.

Counsel for the appellee make this statement in their brief which is borne out by the record:

"It should be further stated that the city of Escanaba retained said machines, never raising any complaint, issued the bond (or certificate of indebtedness, by whatever name it may be called) sued upon; that the execution of said bond is admitted by the pleadings; that said bond was hypothecated to the plaintiff for a loan of $2,000 on the 18th of May, 1907; that one year's interest was paid to him; that the city continued to use the voting machines for two elections after the passage of the act of 1907, after the decision in the *Helme Case*, and after the repeal of the unconstitutional provision in the act of 1907, and after the carton or box had been furnished to place on the inside of the curtain pursuant to the act of the special session of 1907. In fact, that no protest or claim of

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defense was ever made by the defendant city, acting officially."

We think the trial judge was quite right in holding that *Darling* v. *City of Manistee, supra,* was controlling.

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

RICHARDSON *v.* DETROIT UNITED RAILWAY.

NEGLIGENCE—STREET RAILWAYS—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

It was not, as a matter of law, contributory negligence for plaintiff to cross a street car track on which no car was approaching, where plaintiff looked, at a point 17½ feet from the track, and observed a car on the intersecting street that she knew ordinarily did not turn on the street which she was atempting to cross, but proceeded, usually, in the direction it was taking along the intersecting track: and where plaintiff did not look again, being struck by the car as it turned onto the wye.

Error to Wayne; Murphy, J. Submitted January 15, 1913. (Docket No. 109.) Decided July 9, 1913.

Case by Ruth Richardson against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

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Corliss, Leete & Joslyn (A. B. Hall, of counsel), for appellant.

Ernest A. O'Brien and *Edward L. Dwight,* for appellee.

BIRD, J. The plaintiff resided on Helen street, near Jefferson avenue, in the city of Detroit. In the early evening of January 28, 1910, she left her home in company with her husband, daughter, sister, and a Mr. Hamburger to attend a social function. They proceeded south on the east side of Helen street until they reached Jefferson avenue. Just before turning west to cross Helen street, the plaintiff looked toward the east on Jefferson avenue, and observed near the middle of the block a west-bound Trumbull avenue car. Having knowledge that the Trumbull avenue cars turned north on Mt. Elliott avenue, several blocks west, they started across Helen street in single file on account of the snow and slush, the plaintiff being in the rear. Before plaintiff could clear defendant's track on Helen street, she was struck by the car (which had, contrary to its custom, turned in on Helen street), and was seriously injured. Upon cross-examination the plaintiff testified as follows:

"*Q.* From the time you left the sidewalk you never looked for the car?
"*A.* Why should I, I just crossed the track.
"*Q.* Just say yes or no.
"*A.* No, sir; I didn't, certainly not.
"*Q.* From the time you left the sidewalk until you got to the car track you never looked again for the car?
"*A.* Why, no.
"*Q.* And after you had passed over the track you claim to have been struck?
"*A.* Yes, sir; I certainly was."

The defendant at the close of plaintiff's case requested the trial court to direct a verdict in its behalf

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because the testimony showed that the plaintiff was as a matter of law guilty of contributory negligence in failing to look again before going upon the track. This request was denied, and the questions as to her negligence and the negligence of the defendant were submitted to the jury, and she was given a verdict. The defendant now makes the same contention in this court, and assigns error on the refusal of the trial court to grant its request.

The question presented is whether plaintiff, standing on the corner of Helen and Jefferson, seeing the car approaching, with a knowledge of its custom, acted differently in attempting to cross the street than an ordinarily prudent person would have acted under like circumstances. The plaintiff had lived in that vicinity for several years, and was acquainted with the running of the cars. She knew that the Fort street cars went north on Helen street, and that the Trumbull avenue cars went north on Mt. Elliott avenue; therefore on the evening in question, when she saw that the approaching car was a Trumbull avenue car, she concluded it would do the usual thing, and not interfere with their crossing Helen street. The thought has been suggested whether her situation should not be considered the same as though she had looked and had seen no car approaching on the track she was about to cross. A reasonably prudent person is not ordinarily concerned about avoiding a car which he sees on a track which he does not intend to cross. The car in question was on Jefferson avenue. If it adhered to its custom, it would remain on Jefferson avenue. Plaintiff had no thought of crossing Jefferson avenue, they why should she give it further thought? The sudden turning in on Helen street was evidently as much of a surprise to the motorman and conductor as it was to plaintiff, as the record shows the car backed onto Jefferson after the accident, and went

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along on its accustomed course. Under these circumstances, we are asked to hold that the plaintiff, who, when 17½ feet from the track she was about to cross, looked and saw no car approaching thereon, was guilty of contributory negligence as a matter of law for failing to look again before going upon the track. A situation may arise where we would feel it our duty to so hold, but we do not feel that we should do so under the circumstances presented by this record. But it is strenuously argued by defendant that this case is ruled by *Manos* v. *Railway*, 168 Mich. 155 (130 N. W. 664). In that case the plaintiff saw the car approaching on the track she was about to cross. In this case the plaintiff saw a car approaching on a track she did not intend to cross. This case is also likened unto the case of *Clark* v. *Railway*, 168 Mich. 457 (134 N. W. 463). The facts there involved were that plaintiff alighted from a west-bound car, and went around the rear of it, and attempted to cross the east-bound track without looking, when her vision was unobstructed. The facts in these cases are dissimilar.

The question of the plaintiff's negligence was, to say the least, a question about which reasonable minds might and do differ. It therefore was a question to be solved by the jury rather than by the court.

The judgment of the trial court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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STROH *v.* O'HEARN.

1. WILLS—LEGACIES—ESTATES OF DECEDENTS.
   Under provisions of a will, bequeathing to two of decedent's daughters $500 each, "to be paid from the proceeds of testator's farm as soon as it will admit, or at the pleasure" of testator's widow, but within five years at farthest, the bequests were a charge upon the real estate and proceeds realized therefrom by sale, although the will devised the real property to other beneficiaries.

2. SUBROGATION—MISTAKE—EQUITY JURISDICTION—MORTGAGES.
   Where complainant and one of the defendants asking affirmative relief, respectively advanced funds as a loan upon real property and to purchase land belonging to the estate of a decedent, mistakenly supposing that certain children of deceased had a complete title in fee to the realty sold and mortgaged, by conveyance of such children, and where the money realized was employed in paying off incumbrances against the estate property, and in paying certain legacies that the will provided for, complainant and such purchasing defendant were entitled in equity to be subrogated to the rights of the mortgagee who received payment out of the funds advanced by them.

3. SAME.
   The granting of subrogation is an equitable remedy, applicable when persons other than mere volunteers pay a debt or demand that in equity and good conscience should have been satisfied by another, and it is proper in all cases where injustice would follow its denial.

4. WASTE—LIFE ESTATE—LOGS AND LOGGING.
   Life tenants may not convey the timber on real estate, as against the rights of remaindermen, granting, at the same time, permission to remove the timber within five years: the transaction amounts to waste, and is invalid.

5. LIFE ESTATES—INCUMBRANCES—MORTGAGES—INTEREST.
   It is the duty of the life tenant, whose estate is subject to a mortgage upon the fee, to discharge the interest; and the remaindermen are charged with the duty of paying

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the principal. If the life tenants pay the incumbrance or mortgage, they may call on those having title to the remainder for contribution; if the reversioner satisfies the incumbrance when it becomes due, the life tenants may be required to contribute as their share the interest on the amount paid, based on the term of the life estate.[1]

6. SAME—IMPROVEMENTS.

Improvements made by a life tenant, being presumed to be made for his own benefit, are not chargeable to the remaindermen.

7. SUBROGATION—EQUITY.

In granting subrogation to complainants, they should be placed, as nearly as possible, in the condition existing at the time they acquired their interests, and should have a lien only to the amounts paid in satisfaction of the preceding incumbrances.

8. RECEIVERS—ESTATES OF DECEDENTS—LIFE ESTATES.

Upon a showing that an estate in process of probate has been mismanaged, incumbrances executed upon the interests of life tenants who mistakenly assumed to have a fee, that default has been made in the satisfaction of debts and legacies due from the estate, and in interest upon mortgages outstanding against the same, equity may enter a decree appointing a receiver.

9. SUBROGATION—FORECLOSURE OF MORTGAGES.

Proceedings taken by one of the complainants to foreclose his mortgage by advertisement, instituted subsequently to filing his bill for subrogation, which submitted to the court of chancery the entire matter of mortgage foreclosure and his right to a lien, were insufficient to affect the rights of the parties, and could not dispose of any matters in issue in the equity suit.

10. EQUITY—JURISDICTION—ESTATES OF DECEDENTS.

Decedent devised a life estate in his property and estate to his wife, and, after her death, a life interest in specified parcels to his two sons, charging the entire estate with the payment of certain legacies. The sons attempted to

[1] As to the duty of a life tenant to keep property in repair, see note in 33 L. R. A. (N. S.) 669. And upon the right of a life tenant, or person claiming under him, to recover for improvements, see note in 13 L. R. A. (N. S.) 514. And as to the duty of a life tenant to pay taxes, see note in 32 L. R. A. 744.

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convey the fee of separate pracels to one another, and to execute a mortgage upon one of the farms belonging to the estate, following the decease of the widow and termination of her life interest. Out of the proceeds thus obtained, the legacies were paid and an existing incumbrance on the farm satisfied, and one of the life tenants executed to a purchaser, who innocently and mistakenly supposed that he was obtaining a clear title, a deed of a sixty-acre parcel belonging to the estate. Other conveyances were made, and default occurred under the mortgage. Discovering the error and the actual state of the title, the mortgagee filed a bill as complainant to obtain subrogation to the rights of the previously existing and discharged mortgage, making the grantee above-named and another purchaser from one of the life tenants a party. *Held*, that the remedy of subrogation was a proper method of relief in favor of complainant and the purchaser of the sixty acres, that the defendant purchaser last named must be relegated to his action at law for breach of warranty, on the ground that the proceeds went to the grantors personally, and a decree is entered disposing of the entire controversy and remanding the estate to the lower court to be wound up and distributed.

Appeal from Ottawa; Padgham, J. Submitted January 16, 1913. (Docket No. 28.) Decided July 9, 1913.

Bill by Conrad Stroh against John O'Hearn, Joseph Bauman, and other defendants for subrogation. Said Joseph Bauman filed a cross-bill praying for affirmative relief. From a decree for complainant and said Bauman, defendants appeal. Modified.

Farr & Kolyn, for complainant.

Hatch, McAllister & Raymond, for defendants O'Hearn, *et al.*

Charles E. Soule and *C. Edward Soule*, for defendant Bauman.

STEERE, J. This suit involves a tangled tale of

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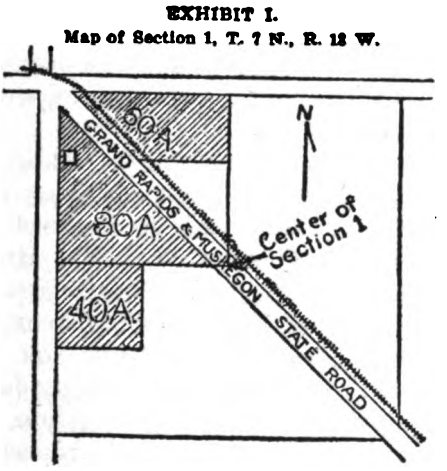
misunderstanding, bad management, and bad advice in the administration of the estate of Dominick O'Hearn, formerly a farmer residing in the township of Tallmadge, Ottawa county, where he owned a farm of 180 acres, which is now the subject of this litigation. The accompanying plat of said farm may serve to more readily understand its shape and the relative location of the different parts now in controversy.

EXHIBIT 1.
Map of Section 1, T. 7 N., R. 12 W.



On January 15, 1892, said Dominick O'Hearn, being the owner of this farm free and unincumbered, together with personal property of considerable value, executed his last will and testament in which he gave all his property, real and personal, except a span of horses to be set off to his son Frank, to his wife, Margaret O'Hearn, for life, and after her death the 120 acres south and west of the State road to his son John O'Hearn for life, and the 60 acres north and east of said road to his son Martin O'Hearn for life, and after their death to their heirs; also legacies of $500 each to his daughters Mary and Agnes, and $1 each to his daughters Lizzie and Mariah, "to be paid from the proceeds of the farm as soon as it will admit, or at

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the pleasure of my wife, Margaret O'Hearn, should she survive that long, but in no case shall a payment be put off to exceed the term of five years;" also providing that after the death of Margaret all personal property that she possessed at that time should be divided equally between the two sons John and Martin. Said Margaret O'Hearn was appointed executrix of the will. Before his death, and after making this will, he and his wife, on April 9, 1894, gave a mortgage for $1,500 on that portion of the farm lying north and east of the State road. This mortgage, with accompanying notes, was proved before the commissioners on claims against his estate, and allowed.

Said Dominick O'Hearn died on September 7, 1898, his wife and said seven children surviving him, and his will was admitted to probate by the probate court of Ottawa county, on October 24, 1898. His widow, Margaret O'Hearn, was appointed administratrix, but did not qualify, and on May 2, 1900, Thomas Malloy was appointed administrator *de bonis non* with the will annexed. On June 5th Malloy, having duly qualified, filed an appraisal of decedent's estate, showing realty valued at $7,900, and personal property valued at $1,335. Commissioners on claims were appointed who, on December 7, 1900, made a report, which was confirmed, showing claims filed against the estate amounting to $3,148.99, in which was included said mortgage amounting, with interest, to $1,739. On March 4, 1901, the administrator, having obtained a license for that purpose from the probate court, sold a strip of land 3 rods wide from the 60 acres north and east of the State road, and adjacent to it, to an interurban railway for $150, and to Frank O'Hearn the northwest quarter of the southwest quarter of section 1, which had been appraised at $1,500 in the probate court, for $1,000, and also contracted to sell to Charles E. Chappell the remainder of the 60 acres north and

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east of the State road for $1,900. That latter sale was not consummated, a payment of $50 being forfeited, but the other sales were duly confirmed by the probate court, and the purchase prices paid to the administrator. The administrator also sold a team of horses for $125, and other personal property. The proceeds of these sales were used in payment of the debts of the estate and expenses of administration.

Following this, on May 27, 1901, the administrator, having applied to the probate court and obtained permission to mortgage, for the purpose of paying debts, the northwest quarter of section 1 lying south and west of the State road for $1,050 (which had been willed to John for life and after his death to his heirs), and the 60 acres lying north and east of the State road (willed to Martin for life and after his death to his heirs) for $1,000, borrowed from Charles E. Chappell the sum of $2,050 at 6 per cent. interest, payable annually, $600 to be paid on the principal June 1, 1904, $600 June 1, 1905, and the balance of $850 June 1, 1906, securing the same by two mortgages on said property. To these mortgages the widow and all children of deceased consented in writing. The mortgages were made subject to the life interest of Margaret O'Hearn, the widow of deceased. At this time the legatees and devisees named in testator's will were all living, and their names were as follows: Margaret O'Hearn, widow; John, Frank, and Martin O'Hearn; Mariah (O'Hearn) Hall, Elizabeth (O'Hearn) Butcher, Agnes (O'Hearn) Loftus, Minnie (Mary O'Hearn) Stroh; the then living prospective heirs of John O'Hearn, who was unmarried, were his six brothers and sisters; the prospective heirs of Martin O'Hearn were three children, Harold, Mabel, and Richard; since then another child has been born to him. The contingencies as to remaindermen, from births, marriages, and deaths, are practically unlimited.

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On June 11, 1901, the administrator rendered his final account, which was allowed by the probate court on July 8th following. This showed that the administrator had paid total debts of $3,219.92, had expended incurred expenses and administration amounting to $204.08, had lost on sale of real estate, from the appraisal, $500, and had personal property on hand valued at $1,231, with real estate unsold valued at $6,150. The order of the probate court required him to turn the estate over to Margaret O'Hearn, the widow, to be enjoyed and used by her as provided in the will, after which he should be finally discharged.

On May 30, 1903, Margaret O'Hearn, widow of Dominick, died. On July 3, 1903, said mortgages were foreclosed in chancery by said Chappell for default in payment of interest, the administrator and several legatees in the will being made defendants, and a decree by default was taken, not for the principal, but for interest only, amounting to $133.15 on one mortgage and $126.84 upon the other, there being no provision in the mortgages for declaring the principal due on default in interest. No sale was had on these foreclosures. The matter was allowed to rest in that shape until March 19, 1904, when the condition of the estate had become such that it seemed imperative something should be done, and upon the advice of certain parties the complainant, Conrad Stroh, together with his wife, who was the Mary O'Hearn named as one of the legatees in the will, and Martin O'Hearn, John O'Hearn, the daughter Lizzie O'Hearn, and Joseph Bauman, a defendant herein and complainant by cross-bill, together with Charles E. Chappell, the mortgagee, met at the office of an attorney, who was Mr. Chappell's solicitor in the mortgage foreclosures, and had a conference resulting in an apparently unintentional juggling of titles in which Martin O'Hearn and his wife conveyed by warranty deed the 60 acres north

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and east of the State road to Joseph Bauman, excepting therefrom the strip sold to the railroad, for $2,200; John O'Hearn conveyed by warranty deed to Martin O'Hearn an undivided one-half interest in that part of the northwest quarter of section 1 lying southwest of the State road, which contained the buildings of the O'Hearn farm, and said John and Martin O'Hearn, and wife, gave to complainant, Conrad Stroh, a mortgage on said last description, for $1,300. In connection with this transaction Martin O'Hearn and John O'Hearn together sold and deeded to said Stroh the timber on a portion of the land, on which they held a life estate, for $350, with five years' time in which to remove the same. The result of the transaction was that Stroh and Bauman together contributed $3,825, out of which was paid $2,309.99 in liquidation of the Chappell mortgages, and $1,000 in payment of the legacies to the two daughters Mary and Agnes, making a total of $3,309.99 applied in paying debts of the estate. At this meeting neither Frank, Mariah, Agnes, nor the children of Martin O'Hearn were present or consented to what was there done. No order was made by the probate court directing the payment of said legacies, but receipts for the same were duly filed in said court. All parties to this transaction manifestly acted upon the assumption that John and Martin O'Hearn had complete titles to the portions of the real estate which they conveyed, instead of life leases. It is conceded that Bauman believed he had purchased a complete title, and that John O'Hearn and Martin O'Hearn understood that Martin had acquired complete title to an undivided half of the 80 acres southwest of the State road, and complainant, Stroh, believed that the mortgage and the deed of the timber given to him were based upon a title in fee simple.

The titles to this property were further confused by the following conveyances: On January 25, 1906,

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complainant Stroh reconveyed to John and Martin O'Hearn the timber he had purchased from them, and received from Martin O'Hearn and wife and John O'Hearn a mortgage for $600 "on that part of the northwest quarter of said section one of said Tallmadge township." This mortgage was not recorded but on October 8, 1906, Stroh surrendered the same to John and Martin, receiving from them a mortgage on the same premises for the sum of $730, the consideration being a surrender of the first mortgage, with accumulated interest, and an additional loan of $100 in cash. On November 27, 1906, Bauman gave a warranty deed, for a consideration of $950, to William W. Nash and wife, defendants herein, of a portion of said section 1, described as beginning 100 feet east of the northwest corner of said section, thence east 961 feet, thence south 906 feet, thence west along the right of way of the interurban railway 1,312 feet to the place of beginning, and on the same date said grantees mortgaged the same to an outside party for the sum of $600; said mortgage being yet unpaid. On October 27, 1907, a house located on the property purchased by Nash and wife from Bauman burned, without insurance.

It is undisputed that at the death of Dominick O'Hearn all of his children were over 21 years of age; that neither Martin O'Hearn nor John O'Hearn are financially responsible, nor have property of substantial value other than their interests in this estate; that Frank O'Hearn and Mariah, the sister, are financially responsible aside from their interests in the estate. John O'Hearn was born in 1848, and is unmarried; Martin O'Hearn was born in 1865, is married, and has four children, the eldest having been born in 1894 and the youngest in 1906.

Defendant Bauman, after receiving his conveyance and making payment, as already stated, immediately

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took possession of the land described in his conveyance, and made improvements thereon of some value and of permanent character, in the way of fencing, ditching, fertilizing, etc., and remained in possession of the same up to the time of the hearing in this case, except the tract, of about 10 acres, which he sold to defendants Nash. It is his claim and testimony that he made betterments to the extent of $961, which is disputed, the value of the same, as shown by the testimony of Frank O'Hearn, being about $361. It is, however, undisputed that he bought the land in good faith for full value, paid for the same, took possession, improved and worked it as his own, believing that he held title thereto in fee simple.

It is manifest from this record that not only did the adult beneficiaries of Dominick O'Hearn's estate, who had control and possession of the property, lack thrift and business ability to properly conserve the assets and protect their own interests and those of their kin who were to follow them, but many errors and irregularities crept into its management while in the hands of the administrator, going through probate. Real estate was sold and mortgaged by authority of the court to pay indebtedness while there was yet personal property undisposed of, mortgages of different amounts were given on different parcels of the estate, with no attempt to adjust the rights of the respective devisees by contribution, or to apportion the burden of the indebtedness on the respective interests.

At the time Stroh and Bauman became interested in this property, on the 19th of May, 1904, the situation was substantially as follows: A legacy of $500 to each of decedent's two daughters, which was a lien upon the estate, was yet unpaid, and the five-year period in which the will provided that it should be paid had already elapsed. Eighty acres of the realty was under a mortgage of $1,050, given by the admin-

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istrator under authority of the probate court to one Chappell, to raise money to pay debts of the estate, and another tract of 60 acres was under a mortgage of $1,000, given in like manner. Both these mortgages had been foreclosed, decrees of foreclosure had been rendered in a chancery court, and the time for sale had arrived, and a 40 acres had been sold for like purpose. The 80 acres in question had been devised to John O'Hearn for life, and after his death to his heirs; and the 60 acres likewise to Martin O'Hearn for life, and after his death to his heirs. Under these conditions Stroh and Bauman, previously disinterested parties, except as Stroh was indirectly interested through his wife, were somehow led to participate in a meeting, held by certain beneficiaries and a creditor, to devise means for relieving the situation, at which meeting legal counsel was present, and to invest their money as heretofore stated. It cannot be said from this record that they were meddlers and interlopers. The testimony shows that Stroh, by reason of his family relations, was induced to participate in an attempt to save the estate, and Bauman, a thrifty neighbor, who had more than once previously been solicited by a member of the family to purchase part of this estate, was induced to enter into the deal, and did so as a legitimate business transaction, buying what he supposed was a good title to a piece of land, as an investment, paying full price therefor, as already shown.

The parties to this suit have filed elaborate pleadings, bill of complaint, amended bills, answers, cross-bills, answers to cross-bills, etc.; by stipulation and otherwise all parties are before the court and all questions raised are in issue by appropriate pleadings.

The legal rights of, and relief sought by Stroh and Bauman are similar, and they are working in harmony for practically the same end. It is alleged and argued in their behalf that they are entitled, by reason of an

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honest mistake, not only on their part but of all parties participating, to be subrogated to the liens of the Chappell mortgages and the legacies to the daughters, to the amount which they have paid to relieve the estate of those burdens, in proportion to the money advanced by each, and that they should be granted foreclosure therefor, otherwise leaving existing conditions undisturbed.

On behalf of the heirs and beneficiaries under the will it is argued that the legacies to the daughters create no lien against the estate, that no subrogation can arise, because Stroh and Bauman were mere volunteers gratuitously paying the debt of another; and it is most seriously contended that, under the peculiar complications and conditions which have arisen, there being contingent remaindermen now undetermined, even to the possibility of some yet unborn, the only way in which this snarl can be equitably untangled and the rights of all parties protected is by granting the special relief prayed for in the answers and cross-bills, to the full extent of decreeing that all deeds, mortgages, and mortgage sales affecting title to the lands of the estate of decedent as it stood prior to March 19, 1904, be set aside, and this court direct that the assets of said estate be marshaled and contribution imposed, under the direction of the circuit court of Ottawa county, for the purpose of conserving the assets of the estate and paying such debts and legacies as may be found a proper charge against it.

We are well satisfied that the legacies to decedent's daughters are a burden on the estate. They were to be paid from the proceeds of the farm, and it is suggested that this means income, or usufruct, only. If there was nothing contained in the will beyond this, that view might be possible. Although the will authorized a postponement of their payment as a convenience to the estate, it was "in no case to exceed the term

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of five years." "Proceeds," as an ultimate contingency under such a provision, means "money obtained by the sale of property." *Birmingham* v. *Lesan*, 77 Me. 494 (1 Atl. 151). These were demonstrative legacies, and a charge against the land from which proceeds to pay them must be realized, either by income or sale, within five years. The gifts were so made as to clearly show testator's intention that the donees should, within a specified time, certainly receive the amounts bequeathed.

"If the language of the will indicates that the testator intended legacies to be paid, knowing that his personal estate would be insufficient for the purpose, or if it appear that in giving the legacies he had the real estate in mind, they will constitute a charge thereon although it be devised." Woerner's American Law of Administration (2d Ed.), *p. 1097, and cases cited.

The Chappell mortgages were given, to meet the needs of the estate, by the administrator under authority of the probate court, with consent in writing of the widow and children of decedent, for the express purpose of borrowing money to pay debts and expenses, which, when received, were so applied. So far as the lender was concerned, they were a valid, subsisting lien on all the realty which they covered. The matter of contribution was between the beneficiaries under the will, and no concern of his.

The mortgages had been foreclosed and sale decreed, and the legacies were past due and payable when Stroh and Bauman first became connected with the estate. They were in no way responsible for the conditions which had arisen. Under the apparent necessity of raising money to avoid a sacrifice of the entire estate and meet these pressing obligations, through innocent misrepresentation, and a misunderstanding all around as to the condition of titles, they advanced the money to pay off those liens, under the honest belief that they

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were paying incumbrances on property bought or security taken, based on perfect titles. We think it is within the power of a court of equity to grant them subrogation, subject to such conditions as are just and equitable. They are not arbitrarily entitled to it as a matter of right, irrespective of equitable considerations arising in favor of other interests which may be affected thereby. Subrogation is an equitable doctrine depending upon no contract or privity, and proper to apply whenever persons other than mere volunteers pay a debt or demand which in equity and good conscience should have been satisfied by another. It is proper in all cases to allow it where injustice would follow its denial, and in allowing it all injustice should be guarded against so far as possible. We need not go afield in other jurisdictions for authority upon this subject; the law is well settled in this State. *Detroit Fire & Marine Ins. Co.* v. *Aspinall,* 48 Mich. 238 (12 N. W. 214); *Lockwood* v. *Bassett,* 49 Mich. 546 (14 N. W. 492); *Warner* v. *Hall,* 53 Mich. 371 (19 N. W. 40); *Kelly* v. *Kelly,* 54 Mich. 30 (19 N. W. 580); *White* v. *Newhall,* 68 Mich. 641 (36 N. W. 699); *Palmer* v. *Sharp,* 112 Mich. 420 (10 N. W. 903); *Dayton* v. *Stahl,* 132 Mich. 360 (93 N. W. 878); *Sproal* v. *Larsen,* 138 Mich. 142 (101 N. W. 213); *Taylor* v. *Roniger,* 147 Mich. 99 (110 N. W. 593).

In the last-mentioned case Taylor purchased land in good faith believing that he was acquiring a perfect title thereto, and paid a valid mortgage thereon, subsequently losing the land by reason of the title not being in his grantors; the court, in disposing of this question, said:

"Complainant purchased the land for $300 cash, understanding that he was obtaining the title in fee subject to the incumbrance. He paid the mortgage thinking he was relieving his own land from the incumbrance, and having paid the mortgage upon the land

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which in fact he did not own became its equitable owner, and entitled to be so considered and to have the same declared to be a subsisting lien upon the land. A court in equity was the only forum having jurisdiction to determine these questions. * * * The court had jurisdiction of the parties and of the subject-matter of the suit, and under the general prayer for relief could make such decree as equity demanded."

In *Detroit Fire & Marine Ins. Co.* v. *Aspinall, supra,* money borrowed by an administratrix, under authority from the probate court, though the court exceeded its powers in granting such authority, was applied to the payment of a debt secured by mortgage upon real estate, and the mortgage was discharged. It appeared that all proceedings relating to the loan, being under color of authority from the probate court, were in good faith, and the estate had the benefit of the money. The complainant asked to be subrogated to the rights which the holders of the mortgage would have had if it had not been paid and discharged. This court there said:

"The complainant does not stand in the light of a stranger or volunteer paying the debt of another without authority, nor as one merely loaning money to pay off a debt. The complainant's equities do not stand upon any such ground; but because of the mistake of all parties, who, acting in good faith and under color of authority, paid an existing obligation against the estate under an agreement that they should have security upon the estate, it is therefore equitable that the property thus saved to the estate should now, in part at least, respond to the claim of the complainant."

Is it possible, or just and equitable, to grant subrogation and order foreclosure, leaving other complications resulting from the mistake undisturbed?

After Stroh and Bauman became connected with this estate, and the various conveyances mentioned had been made, Bauman, by the records, was the owner of a life estate only, in the land north and east of the

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State road, except that portion previously sold to the interurban railway and the 10 acres sold by him to Nash and wife, to whom he conveyed but a life estate. This life estate was not for their own lives, but that of Martin O'Hearn. Martin and John O'Hearn together owned an estate for the life of John in the 80 acres south and west of the State road. Their timber deed to Stroh authorized waste of the fee, and was invalid. The $1,300 mortgage on the 80 acres, given by John and Martin to Stroh, was not an incumbrance on the fee, but only on the life estate they held, which would terminate at the death of John.

The legacies to the two daughters and the mortgages held by Chappell were paid and discharged. These two mortgages had been foreclosed and sale decreed because of default in payment of interest. This was a default of the life tenants. Life tenants, while entitled to the possession and income of the realty, are obligated to pay taxes and the interest on mortgages and debts which are a lien upon the fee of the property. During the widow's life it was her duty to do this. After her death it devolved upon John and Martin. Had they paid this interest, the mortgages could not then have been foreclosed, for they were not yet due. It was the duty of the remaindermen, or owners of the fee, to care for the principal of any incumbrances upon the property; in case they did not do so, and the life tenants paid the same, or purchased the property at foreclosure sale, they could not acquire an adverse title against the remaindermen. While it was the duty of the remaindermen to prevent foreclosure and save the property, if the life tenants, being under no obligation to do so beyond paying interest, did pay the incumbrances, they would be entitled to call upon the remaindermen for contribution, and would have a lien upon the property for the amount so paid, less interest on the principal of the indebted-

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ness, to be computed against them during the continuance of their life estate; if, on the other hand, the reversioners paid the indebtedness when due, the life tenants would be required to contribute as their share the interest on the amount paid, on the basis of its continuance during the life estate. *Whitney* v. *Salter,* 36 Minn. 103 (30 N. W. 755, 1 Am. St. Rep. 656); *Defreese* v. *Lake,* 109 Mich. 415 (67 N. W. 505, 32 L. R. A. 744, 63 Am. St. Rep. 584); *Damm* v. *Damm,* 109 Mich. 619 (67 N. W. 984, 63 Am. St. Rep. 601); *Plympton* v. *Boston Dispensary,* 106 Mass. 544; *Jones* v. *Gilbert,* 135 Ill. 27 (25 N. E. 566). Bauman took upon himself, when receiving his deed of a life estate, the burden of paying his proportionate share of interest on the indebtedness against the estate on the basis of the life of Martin.

"If the property is sold under foreclosure to satisfy an incumbrance, the life tenant may be a purchaser at the sale. He cannot, however, hold the title adversely, but will be deemed to have made the purchase for the benefit of himself and the remainderman or reversioner, in case the latter will contribute his share of the purchase price, and does so within a reasonable time." 16 Cyc. p. 618.

Bauman, having paid the mortgage, or any other lien, on the 60 acres he held as a life tenant, would himself have a lien thereon for the amount paid, deducting interest computed for the estimated duration of his life tenancy. As life tenant he was also required to pay the actual expenses of care and maintenance of the estate. Improvements made by him during his tenancy are presumed to be for his own benefit and, as a rule, not a charge against the estate or the remaindermen.

This is but a beginning of the complications which the manner of handling this estate and resulting condition of the titles develop for consideration if the interests and rights of the parties are to be adjudicated

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on the basis of the conveyances as they now appear.

It is the claim of all parties to this litigation that the transactions of March 19, 1904, arose from a general misunderstanding, and were honest but unfortunate mistakes. The participants on both sides claim that had the true situation and condition of titles been then known and understood, that which was done would not have been done. They all ask in this suit, by bill and cross-bill, to be relieved from the consequences of the mistakes then made. The contention is over the extent and nature of the relief which should be granted. The inequity of the relief asked by Bauman and Stroh is that they desire to retain the benefits accruing to them from the mistakes made, and to be relieved of the harm. It is manifest that their interests and purposes are adverse to those of the remaindermen. It can fairly be inferred from the record that they are seeking to acquire title to this land and wipe out the reversionary interests. The hold which they have on the property through life estates acquired by the conveyances inadvertently given puts them in an advantageous position to that end, by making it more difficult for the remaindermen to harmonize interests and so adjust matters as to provide the necessary means to protect the estate, or, in case of sale, to realize an adequate price; and uncertainties of the contingent interests further add to that difficulty. In granting relief from the consequences of these mistakes, the rights and interests of all parties must be considered. We think it proper, and within the power of a court of chancery, to grant subrogation to Bauman and Stroh to the amount of the liens against the estate which they have paid, less the value of any benefits they may have received from the estate; but the subrogation must be in lieu of that out of which the mistakes, which justify the court in granting subrogation asked, arose. The mistakes ran

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through the negotiations, agreements, conveyances, and payments of March 19, 1904, resulting in relieving the estate of the burden of the mortgages and legacies then paid. The reimposition of that burden must be accompanied by a restoration of then existing conditions as near as possible. With these conveyances canceled and subrogation granted, Stroh and Bauman stand in their relation to the estate as secured creditors only to the amount of the money they advanced in payment of liens against it. Their only right is to have their liens enforced with reasonable diligence. On this record under the relief granted they are not entitled to possession of the property.

The owners of the property, life tenants and remaindermen, all ask that it be taken in charge by the court, through a receiver, and sold, the debts paid, the assets marshaled, and contribution apportioned. Under the undisputed facts in this case, we think this request should be granted.

There are minor beneficiaries who appear by guardian. The protection of the rights of infants is always a matter of special concern in a court of chancery. The life tenants and remaindermen are in default in paying debts which are a lien on the land. They are manifestly incompetent or unwilling to care for the estate and conserve its interests. The history of its mismanagement so indicates, and they, in effect, admit it in their pleadings. The court of chancery has power to order such auxiliary proceedings to conserve the property in litigation from being dissipated and lost. The only objection to this course is from Stroh and Bauman. If their claims as creditors are satisfied within a reasonable time, their rights and legal interest in the estate end. It is shown that they contributed a fund of $3,825—Stroh $1,625 and Bauman $2,200—out of which $3,309.99 was applied in liquidation of liens on the estate, and they should stand sub-

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rogated proportionately. Interest should be computed in their favor, together with any increase of value shown to have been added by them to the realty by reason of permanent improvements, and they should be charged with the rental value of any portion they have had in possession, which ultimately, in adjusting contribution between the beneficiaries, should be credited to the life tenants.

The singular record of this suit discloses that it was begun by Stroh in April, 1907, was heard and submitted in the trial court March, 1909, and finally decided in that court in December, 1911, after which an appeal was taken to this court. It is stated in the briefs of counsel that, after filing his bill of complaint, Stroh proceeded independently to foreclose by advertisement the $750 mortgage given him by John and Martin O'Hearn on the life estate of John in the 80 acres southwest of the State road, and has been in possession of said property for some time. This mortgage is set out in his bill of complaint, and the court asked to adjudicate his rights in that connection. The matter of subsequent statutory foreclosure is not properly presented here, by pleading or proof, but if it be shown in a supplemental proceeding that, after tying up this estate in the chancery court, he sought to forestall results and secure possession and enjoyment of a portion of the estate by thus assuming to dispose of a matter previously submitted by him to the chancery court, the foreclosure may be held for naught. The mortgage was proved at the hearing. While some remarks of complainant's counsel then made indicated a waiver of this claim, a fair inference is that no claim was made of right to assert it against the estate as an entirety. The same misunderstanding as to titles existed when it was given, though it was at a time subsequent to the payment of the mortgages and legacies. So far as shown, Martin and John received the

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proceeds of it. It is a personal liability of theirs, and a lien on John's life estate in the 80 acres subject to the prior liens of the legacies and mortgages.

Defendants Nash dealt with Bauman, and paid him for the title which failed. He gave them a warranty deed, and their recourse is against him upon his warranty.

Having obtained jurisdiction over this estate on well-recognized equitable grounds, it is within the power of the chancery court to retain jurisdiction, fully administer and wind up the same. We think this should be done with all convenient speed.

The decree of the lower court must be reversed and a decree may be entered herein in accordance with the foregoing conclusions, remanding the case to the circuit court of Ottawa county in chancery, with authority to appoint a receiver, take possession of the property of said estate, and sell the same, pay the debts of said estate (in determining the exact amount of which under the rules above intimated further testimony may be heard), award contribution and distribution between beneficiaries, and take such other and further proceedings as may be found necessary in order to fully administer and close said estate. Costs of this appeal are awarded in favor of appellants against Stroh and Bauman.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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VANDERVELDE *v.* WILSON.

1. USURY—INTENT—WRITTEN CONTRACT—MORTGAGES—TAXATION.
   In addition to 7 per cent. interest provided for in a mortgage, it was usury to stipulate that the mortgagor should pay the mortgage tax, whether or not the parties actually intended to carry out the arrangement.

2. SAME—EQUITY.
   Under the statutes of this State, no remedy in equity is provided for the mortgagor to restrain the foreclosure of the security on the ground of usury, or to obtain relief for usurious provisions in the instrument. 1 Comp. Laws, §§ 4857, 4858 (2 How. Stat. [2d Ed.] §§ 2870, 2871).

3. SAME—EQUITABLE REMEDIES—PLEADING.
   Since statutes forbidding usury are penal in character, they must be strictly construed, and if a complainant is not strictly within the terms of the statute relieving the borrower of interest, he must offer or tender in his pleading in chancery to pay the principal and five per cent. interest thereon.

4. SAME.
   Unless some attempt has been made by the mortgagee to enforce payment of the mortgage tax as provided for in the contract, no equitable relief can be awarded in a suit to enjoin foreclosure by advertisement.

Appeal from superior court of Grand Rapids; Stuart, J. Submitted January 23, 1913. (Docket No. 10.) Decided July 9, 1913. Rehearing denied November 3, 1913.

Bill by Maggie Vandervelde against Charles M. Wilson for an injunction. From a decree for defendant, complainant appeals. Affirmed.

Myron H. Walker, for appellant.

Hugh E. Wilson, for appellee.

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KUHN, J. The bill of complaint in this cause is filed to restrain the foreclosure of a mortgage by advertisement. The rate of interest specified in the mortgage is 7 per cent. and, in addition, the mortgage provides:

"It is expressly agreed, that the said party of the first part, within thirty days after the same become due and payable, will pay all taxes and assessments which shall be levied upon the said lands, or upon or on account of this mortgage, or the indebtedness secured hereby, or upon the interest or estate in said lands created, conveyed or represented by this mortgage, or by said indebtedness, whether levied against said party of the first part, his legal representatives or assigns, or otherwise; and the said party of the first part hereby waives any and all claim or rights against said party of the second part, his legal representatives or assigns, to any payment or rebate on, or offset against, the interest or principal of said mortgage debt by reason of the payment of any of the aforesaid taxes or assessments. And that in default of the payment of any or all of said above-mentioned duties, assessments and taxes, by said party of the first part, within the time prescribed by law, it shall be lawful for said party of the second part, his executors, administrators or assigns, to pay and discharge any or all of said above-mentioned duties, assessments and taxes, and the moneys thus paid by said party of the second part, shall be a lien on said premises, added to the amount secured by this mortgage, and payable forthwith with interest at the rate of seven per cent. per annum."

It is claimed by complainant that the mortgage is usurious, because it provides for the payment of 7 per cent. interest and, in addition, the taxes upon the mortgage, and that in default of such payment such amount shall be a lien on the premises added to the amount secured by the mortgage; also, that because the contract is usurious all payments made should be applied on the principal in reduction of the same. It is contended by the defendant that the trial judge who dis-

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missed the bill came to a correct conclusion, for these reasons, as stated in the brief:

(1) The mortgage is not usurious, because there was no intent to compel the complainant to pay more than 7 per cent., the legal rate.
(2) This suit cannot be maintained under the statute upon which the complainant relies.
(3) Complainant cannot maintain this suit because she has not offered to do equity.

In support of the proposition that there was no intent, testimony of the defendant was taken to show that he had no intention at the time of the making of the mortgage of asking the complainant to pay any tax on it; that he "never asked her to pay it or never considered the subject of asking her to pay it." It is contended that the intent must be proven, and that in view of this testimony it will not be presumed. The contract here made is unambiguous, and its legal meaning clear. It follows that the parties to the contract must be held to have intended the result expressed by the contract. It speaks for itself. Mr. Page, in his work on Contracts (page 730), says:

"The view taken by other courts makes the contract for unlawful interest usury without reference to the intention of the parties. Apart from mistakes in expression and in computation, this is undoubtedly the correct view. Hence a bona fide mistake of law does not prevent the contract from being usurious."

The insertion of the mortgage tax clause cannot be said to be a mistake in expression or computation, and no such claim is made in the answer of defendant. Our attention is challenged to the case of *Fifth Nat. Bank* v. *Pierce*, 117 Mich. 376 (75 N. W. 1058). In that case it clearly appeared that it was a clerical error, and such a mistake as should be corrected. In *Becker* v. *Headsten*, 137 Mich. 478 (100 N. W. 752), cited to be directly in point by defendant, it appears that the mistake was one in computation. In the case

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of *Green* v. *Grant*, 134 Mich. 462, 467 (96 N. W. 583, 585), this court said:

"Nor can we assent to the contention of defendant that a contract is usurious because the aggregate of interest reserved and taxes paid exceeds the maximum allowed by the statute. In our judgment, such a contract is not usurious *per se*. Whether or not it is usurious depends upon the intention of the lender. If, at the time the contract was made, he knew that the aggregate of interest reserved and taxes to be paid would exceed the statutory rate, as he would if the interest reserved was the maximum interest, the contract is usurious. If, on the other hand, at that time he believed that the aggregate of interest and taxes would not exceed the maximum rate allowed by statute, it would be as contrary to law as to good morals to declare it usurious."

Counsel says that the statement in the opinion, "as he would if the interest reserved was the maximum interest," is *obiter dictum*. This is, however, a correct statement of the law, and when the contract in terms reserves usury the intent is necessarily implied. *Fretz* v. *Murray*, 118 Mich. 302 (76 N. W. 495); *Estey* v. *Loan Ass'n*, 131 Mich. 502 (91 N. W. 753); *Stack* v. *Cedar Co.*, 151 Mich. 21 (114 N. W. 876, 16 L. R. A. [N. S.] 616, 14 Am. & Eng. Ann. Cas. 112); *Rosen* v. *Rosen*, 159 Mich. 72 (123 N. W. 559, 134 Am. St. Rep. 712); *Continental Nat. Bank* v. *Fleming*, 170 Mich. 624 (134 N. W. 656); 39 Cyc. p. 920.

Complainant relies upon sections 4857 and 4858, 2 Comp. Laws (2 How. Stat. [2d Ed.] §§ 2870, 2871), which provide:

"(4857) SEC. 2. No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract, whereby or whereon a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear

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that a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon.

"(4858) SEC. 3. Whenever it shall satisfactorily appear by the admission of the defendant, or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or received in violation of this act, the court shall declare the interest thereon to be void."

These two sections were enacted at the same time by the legislature in 1891 and must be construed together. Section 2 is a copy of section 4 of the previous usury statute—1 How. Stat. (1st Ed.) § 1595—with the exception that section 4 merely forfeited the interest in excess of the legal rate, while the act of 1891 forfeits all interest. In the previous act, "the following section"—1 How. Stat. (1st Ed.) § 1596 (Sec. 5)—exempted bona fide holders of negotiable paper from the provisions of section 4 of that act. The words in section 2 of the act of 1891, "except as is provided in the following section," were undoubtedly inadvertently left in the section, as section 3 of the present act contains no exceptions whatever from the provisions of the previous section. The section with reference to the bona fide holders of negotiable paper was omitted from the act of 1891 and section 3 was added. When this section was added the following statutes appeared in the statutes of the State of New York (Banks & Bros. Rev. Stat. of 1889, pt. 2, chap. 4, tit. 3 [8th Ed.], vol. 4, p. 2514):

"SEC. 4. Whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the said title or of this act, it shall not be necessary for him to pay or offer to pay any interest or principal on the sum or thing loaned; nor shall any court of chancery require or compel the payment or deposit of the principal sum or interest, or

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any portion thereof, as a condition of granting relief or compelling or discovering to the borrower in any case, usurious loans forbidden by said title or by this act.

"SEC. 5. Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt, has been taken or received in violation of the provisions of said title or of this act, the court of chancery shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled."

Section 3 of our act is practically a copy of section 5 of the New York statute, excepting that the latter part of the New York section is omitted from ours. The New York statute expressly provides for the filing of a bill in chancery by the borrower to obtain relief from a usurious contract, but our legislature in adopting section 3 omitted all reference to such relief in a court of equity, unless it can be said that the words "admission of the defendant" left in the section are sufficient to warrant the conclusion that it was the intention to give the right to proceed in that way. It seems clear, however, that if such had been the intention of the legislature a provision similar to the latter part of section 5 of the New York statute would have been enacted into our statute, and the chancery court given explicit power. The failure to do this is to our minds very significant, and it seems that all the legislature desired to do, and did do, was to strengthen the provisions of section 2 and give the court the power, if an effort is made to collect usurious interest, to declare it void. We are forced to the conclusion that the words, "by the admission of the defendant," were also inadvertently left in the section and have no meaning in the section, as they are entirely inconsistent with the remainder of the act, which refers only to actions brought by the lender to enforce a usurious contract.

Usury statutes, being penal in character, must be

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strictly construed, and unless the statute takes away equitable rights it follows that they remain. He who asks equity must do equity. Webb, in his work on Usury (page 398), says:

"But where the bill for relief against an usurious contract does not come strictly within the terms of the statute relieving the borrower of either paying or tendering interest in addition to the principal he will be governed by the general rule of law and compelled to pay or tender both principal and legal interest, for such statutes are construed strictly.'

Complainant, in order to obtain relief in a court of equity against an attempt to collect usurious interest, must offer to pay the principal and legal interest, it being understood that this means the legal rate of interest fixed by the statute and not the rate provided for in the mortgage. Complainant relies upon the case of *Estey* v. *Loan Ass'n*, 131 Mich. 502, at page 505 (91 N. W. 753). While the opinion does not expressly show it, the record of the case, which we have examined, discloses that the defendant filed a cross-bill and sought to enforce its mortgage. Mr. Justice MONTGOMERY, who wrote the opinion, must have had this in mind, for he says:

"We * * * hold that, *where it is sought to enforce a contract* which was usurious at its inception, in so much as our statute provides that the court shall declare the interest void (section 4858), and that the debtor shall not be compelled to pay interest (section 4857), the recovery should be limited to the principal sum, less payments actually made, however designated at the time of payment."

This court, in the case of *Malone* v. *Danforth*, 137 Mich. 227, at page 231 (100 N. W. 445), in which it was sought to have a deed and contract declared to be a mortgage and the contract rate of interest was usurious, said:

"The complainant, having appealed, protests against

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the allowance of interest on the moneys advanced, on the ground that the contract was usurious. This contention cannot prevail. The contract is not in its terms a mortgage. The complainant seeks to have a court of equity declare it such, and, in asking aid, he should be prepared to do equity. The court below decreed simple interest, and this order is affirmed."

This is controlling of the instant case. No attempt having been made to collect illegal interest, complainant in a court of equity had no reason to complain.

The decree dismissing the bill is affirmed, without costs to either party in this court and with costs to the prevailing party in the court below.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

HARGER *v.* WATSON.

1. BROKERS—COMMISSIONS—CONTRACTS—OPTIONS.

Where a broker advised the owner of hotel property that he had a prospective buyer, asking about price and terms, and naming the party, and the owner telegraphed giving the price and stating that he had six buyers, later stating by letter his terms and closing with the broker's offer of $38,000 for the property, upon commission of $1,000, and where the broker arranged with other purchasers to take the hotel property through a deed to and in the name of the one purchaser mentioned, who was to execute a quit-claim deed to the parties in interest, the broker was entitled to recover his commission, although the sale could

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not be completed because the property became involved in litigation so that the owner could not convey a clear title.[1]

2. SAME.

The broker's duty is performed when he has found a purchaser that is ready, willing, and able to purchase upon the terms specified, and his right to commissions is not defeated if the title proves to be defective or unmerchantable.[2]

Error to Oakland; Smith, J. Submitted April 23, 1913. (Docket No. 16.) Decided July 9, 1913.

Assumpsit by Edwin S. Harger against William C. Watson for broker's commissions. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

Perry & Lynch, for appellant.

Peter B. Bromley, for appellee.

KUHN, J. The plaintiff sues to recover a commission claimed by him to have been earned in obtaining a purchaser for defendant's hotel property in the city of Pontiac, known as the Hodges Hotel property, and also to recover $29 paid for an abstract of title to such property. The defendant resides in Pasadena, Cal., and all communications between the plaintiff and the defendant with reference to the property were in writing in the form of letters and telegrams. At the close of the evidence, the defendant's counsel requested the court to instruct the jury to render a verdict in favor of the plaintiff for $29 and interest, amounting to

[1] On the question of the broker's right to commissions where sale fails because of defects in employer's title, see notes in 3 L. R. A. (N. S.) 576 and 24 L. R. A. (N. S.) 1182. And as to the right to compensation upon procuring customer to take an option, see note in 43 L. R. A. (N. S.) 91.

[2] As to when real estate broker is considered as procuring cause of sale or exchange, generally, see note in 44 L. R. A. 321.

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$29.65, as this item was not contested. The court denied this motion, but instructed the jury to find a verdict for the plaintiff for $1,029.65, being the amount of commission claimed and the item of the abstract, and such a verdict was accordingly rendered by the jury, and judgment had thereon.

The only errors relied upon and discussed by counsel for defendant are the refusal of the court to instruct as requested, and in instructing the jury to render a verdict for the amount they did.

The first communication between the parties was a letter dated April 10, 1912, from the plaintiff to defendant:

"REAL ESTATE OFFICE OF EDWIN S. HARGER.
"No. 7 North Saginaw Street.
"PONTIAC, MICH., April 10th, 1912.
"W. C. WATSON,
"Pasadena, California.
"*Dear Sir*—Mr. E. Howland requested me to write you concerning your hotel here. He wished to know if it were for sale, and if you did want to sell what you would ask for it. If you were about to do anything would like to hear from you.
"Yours respectfully,
"EDWIN S. HARGER."

In reply the following telegram was received:

"PASADENA, CALIFORNIA, April 17th.
"EDWIN S. HARGER,
"No. 7 North Saginaw Street,
"Pontiac, Michigan.
"Hotel price $38,000, Wire immediately, have six purchasers. "W. C. WATSON."

Harger sent the following telegram in reply:

"April 18th, 1912.
"W. C. WATSON,
"936 Magnolia Ave.,
"Pasadena, California.
"Think man will take property. Wants thirty-six hour option. Will you give it? Answer.
"EDWIN S. HARGER."

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In reply he received the following:

"PASADENA, CALIFORNIA, April 18th.
"EDWIN S. HARGER,
"Pontiac, Mich.
"Make sale. One thousand for you. Send draft for balance Crown City National Bank, Pontiac. On receipt will send deed. Answer immediately.
"W. C. WATSON."

In the above telegram it is undisputed that by "Pontiac" was intended "Pasadena," the Crown City National Bank being in Pasadena. To this Harger replied that the property was sold, and that $37,000 would be paid to Watson and $1,000 retained by him upon receipt of an abstract of title showing property free and clear of leases and incumbrances. In reply the following communication was received from Watson:

"PASADENA, CALIFORNIA, April 22d.
"EDWIN S. HARGER,
"Pontiac, Michigan.
"Will accept $37,000 net to me for Hodges property and give warranty deed subject to lease to Henry A. Thomas, and subject to all taxes and assessments since January first, 1912. Have receipt for taxes paid January 8th, 1912, and also paid, November 30th, last paving tax in full. Will furnish abstract, which you may order at my expense. My offer must be accepted at once and money deposited in First Commercial Bank at Pontiac, to my credit, within fifteen days.
"W. C. WATSON."

It is the claim of the plaintiff that when Mr. Howland learned of the Thomas lease he refused to take the property, and the plaintiff then immediately procured other purchasers who were willing to buy the property subject to this lease. To these purchasers Harger gave the following writing:

"PONTIAC, MICH., April 26, 1912.
"Received of John B. Brown, Jay S. Stockwell, Jr., Arthur E. McLintock and Frances R. Harger, the sum

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of $1,000, to apply upon the Hodges House property, located at the corner of Saginaw and Pike streets, in the city of Pontiac, Michigan; the balance of said $37,000 to be paid to me on or before the 7th day of May, 1912. Abstract to be furnished by me on or before said date, showing good and merchantable title.

"WILLIAM C. WATSON,
"By Edwin S. Harger, Agent."

It is further claimed that an agreement was had between the prospective purchasers and Howland and Harger that the previous arrangement should stand, and that the deed was to come on in Howland's name, and that he was to then make a quitclaim to the new purchasers. The money, $37,000, was paid to the First Commercial Bank within the time specified in letter, Watson was so notified, and he forwarded the deed. Before the deed was actually delivered, however, to the purchasers it was discovered that a suit by attachment levy on this property had been started, and also a *lis pendens* filed in a suit for specific performance of an alleged contract made by Watson with another purchaser to convey the property to him. Because of these suits involving the title to the property the purchasers refused to carry out the agreement, the bank at Pontiac so notified the defendant, and returned the deed to the bank at Pasadena.

It is the contention of the appellant that the authority of Harger to sell the property was limited to a sale to Howland, and no one else was thought of by Watson as a purchaser. It would seem that this question should be determined from the correspondence between the parties, and in the very first telegram sent by Watson to Harger he speaks of having six purchasers. There is no doubt in our minds that if these suits had not been started no question would have been raised about the title going to the new purchasers through Howland. This position of appellant has all the earmarks of an afterthought.

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Harger was not to blame for the failure to make the sale. He did everything necessary on his part to complete it within the terms agreed upon. He had the parties ready to accept the title, and the money was in the bank. They were entitled to a merchantable title, and clearly Harger should not be deprived of the result of his efforts because of the inability of Watson to give such a title, without any fault on Harger's part. The rule of law applicable is well stated by Mr. Mechem in his work on Agency in speaking of the duty of the real estate broker, par. 966:

"His duty is performed when he has found a purchaser who is ready, willing, and able to purchase upon the terms specified."

In this case there can be no question that the terms of Watson were complied with, and the purchasers procured by Harger were ready, willing, and able to purchase upon the terms specified. *Hannan* v. *Moran*, 71 Mich. 261 (39 N. W. 909); *Wood* v. *Wells*, 103 Mich. 320 (61 N. W. 503).

The charge of the trial court was a proper one, and the judgment is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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McKENZIE *v.* CALL.

1. FRAUD—EVIDENCE—EQUITY.
   Upon a review of conflicting testimony, it is *held*, that complainants' bill to cancel an exchange of real and personal property should be dismissed for failure of complainants to establish that they relied on the alleged false representations as to value; *held*, also, that defendants did not falsely represent that certain pianos were free from incumbrances or conceal the amount due thereon.
2. SAME—CROSS-BILL—WARRANTY.
   No relief can be awarded to defendants, as prayed in their cross-bill, filed in a suit to cancel or annul an exchange of property, where complainants charged fraud and defendants claimed damages for breach of warranty.

Appeal from Shiawassee; Miner, J. Submitted April 17, 1913. (Docket No. 80.) Decided July 9, 1913.

Bill by William E. McKenzie and Tod Kincaid against Rose Call and Emma Connelly for cancellation of certain deeds and contracts and for an injunction. Bill dismissed as to defendant Connelly. Defendant claimed affirmative relief. From a decree for complainants, defendant appeals. Reversed; bill and cross-bill dismissed.

A. L. Chandler, for complainants.

Brennan, Donnelly & Van De Mark (S. O. Van De Mark, of counsel), for defendant.

STONE, J. The bill of complaint in this cause stated: That complainants on September 20, 1909, were the owners of certain lots in the city of Corunna upon which there was a valuable dwelling house and outbuildings of the value of $6,000; that they sold said

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property to defendant Emma Connelly of Detroit, and took back a purchase-money mortgage of $2,500; that said purchaser never made any payments upon said mortgage, and that under the power of sale therein said mortgage was foreclosed on April 11, 1911, by a public sale to complainants for $2,669, not including costs, and that complainants held a sheriff's deed of said premises, subject to redemption; that, desiring to convert their interest into "more liquid" assets, they on August 9, 1911, sold and transferred their equity in said property to defendant Rose Call of Detroit; that they executed and delivered to said last-named defendant a warranty deed, subject to redemption from said foreclosure for an expressed consideration of $1 and other considerations to them paid; that said defendant Call in consideration of said conveyance agreed to sell and deliver to complainants a certain amount of personal property consisting of furniture located in a rooming house in Detroit, known as 153 Congress street east; that, in order to induce complainants to make the exchange, said defendant represented that said furniture was of the value of $6,000, and was insured for $10,000; that she desired to dispose of the same, and rent the house to complainants, as she was to be married in a day or two, and was going to leave for California, and was anxious to close the deal immediately; that if complainants would rent the house for one year, to be occupied for rooming purposes, for a rental of $175 per month, she would immediately deliver all of said property, and that complainants could rent said house and furniture to her sister, called Beatrice Bell, that she, said defendant, would not lease to her sister directly, but that, if complainants would lease the house and sublease to said sister, the latter would take said house and furniture at a rental of $575 per month in advance, and complainants would thus have immediate use for the fur-

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niture which they were purchasing from said defendant; that complainants believed the statements of said defendant with reference to the value of said furniture, and defendant's purpose in selling, and the rental of said property, and accepted said furniture, and the lease of said house, and rerented the same to said Beatrice Bell for one year, with the privilege of five years, after August 9, 1911, for the rental of $6,900 per annum in payments of $575 per month, payable monthly in advance. That the defendant represented to complainants that said furniture was free and clear from all liens and incumbrances, except a debt of $930 to Crowley, Milner & Co., and $1,780 to Weil & Co., which representations were untrue, and known to be untrue, as the pianos mentioned in the bill of sale of said furniture had not been paid for, and that there were over $700 due on said pianos alone, and that there were other incumbrances on said property, which made the same of little or no value whatever to complainants, and that they never had received possession of the same. That said furniture was of no value over and above the incumbrance thereon: that defendant had no intention of getting married or leaving the city, and her sister, Beatrice Bell, did not intend in good faith to lease said building and furniture of complainants, and said statement and leasing amounted to a conspiracy between said persons to cheat and defraud complainants, and get them to take said lot of second-hand furniture subject to said indebtedness, and to cheat and defraud complainants of the mortgage interest in said Corunna property, which scheme, as far as possible, said defendant had carried out; that after the sale of said furniture, which included all the furniture in the house, and in her possession at 153 Congress street east, the defendant entered said building and carried away a large amount of said furniture, the exact value of which complainants were not able to

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accurately estimate, but worth several hundred dollars; that the property which defendant had turned over to complainants under said bill of sale was incumbered for over $3,000, which was more than it was worth, and that she insists on keeping said Corunna property, of the value of $3,000, without paying anything therefor; that upon complainants discovering the fraud and conspiracy to cheat and defraud them out of their said property they called upon defendant to redeliver said deed and lease, the consideration of which she had taken away, or to perform her agreement, which she had refused to do, but insisted on holding the deed of said Corunna real estate.

Complainants in their bill prayed for an injunction restraining defendant from recording the deed given by complainants; that their damages be ascertained, and the same satisfied out of any interest which defendant may have in such furniture; and that defendant be restrained from taking possession of the Corunna real estate, and that said deed and lease be canceled and delivered up to complainants. The bill of complaint was dismissed as to defendant Emma Connelly.

The answer of defendant Rose Call denied the fraud, misrepresentation, and conspiracy charged in the bill of complaint. It denied that she ever represented to complainants, or either of them, that the said furniture was worth the sum of $6,000 or any other sum. Defendant admitted that the furniture and household goods on the premises where said furniture purchased by complainants was situated were insured in the sum of $10,000, but averred that the policies covering the same included much other personal property not sold to complainants. The answer averred that long prior to the 9th day of August, 1911, and persistently up to that date, one of the complainants had solicited defendant to sell said personal property and rooming

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house business; that any negotiations or agreements made with the sister of defendant relating to the leasing of said premises and the furniture and household goods therein contained, or any negotiations had with said sister relative to running said rooming house for complainants, were had directly with said sister, and not with the defendant. The answer further denied that part of the bill of complaint charging that defendant represented that the furniture was free and clear from all liens and incumbrances, except as to the amounts due Crowley, Milner & Co. and Weil & Co. The defendant averred that she had in all things carried out the contract and agreement made with said complainants; and by way of cross-bill she averred that the premises conveyed to her by complainants were not free and clear from incumbrances thereon, but certain taxes, which formed a lien thereon, due and payable prior to the year 1911, were unpaid on said premises, and that she had been obliged to pay the same, amounting to the sum of $120, in order to obtain record of said deed, and she prayed that complainants be decreed to reimburse her in this amount, with interest thereon. The complainants answered the cross-bill, and issue was joined.

The testimony taken in this case is quite voluminous, and there is an unreconcilable conflict between the testimony produced on behalf of complainants and that on the part of defendant upon nearly every material matter involved. A decree was entered for complainants in so far as relief was prayed for, relating to the conveyance of the Corunna property.

There are really three points raised by the pleadings and testimony and discussed by counsel in the case:

(1) Did defendant fraudulently deceive the complainants as to the value of the furniture, and did they rely upon such misrepresentations?

(2) Did the defendant conceal from the complain-

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ants the amount due on the piano contracts, and warrant them free and clear?

(3) Were the complainants aware of the business they were buying, and does the doctrine *"in pari delicto"* obtain?

1. Some important, and we think controlling, facts appear by the documents which were introduced in evidence in the case. In the bill of sale given by the defendant to the complainants of the furniture and household goods, after enumerating the list of articles sold, appears the following:

"It is the intention of this statement to include all the furniture now in the above said place, except the pieces reserved, namely, the davenport in red room, couch in front room, all the furniture in Miss Bell's room upstairs except carpet, one dresser in east room upstairs and all furniture in Miss B. Bell's room, subject to $930 to Crowley, Milner & Co. and $1,788 to Weil & Co."

The evidence shows that the complainants were experienced business men. Complainant McKenzie was 54 years old, and had been a school teacher for many years; he had been engaged in the real estate and insurance business in the city of Detroit for some time before the transactions appearing in this case; he was well acquainted with the defendant and her sister, and the business in which they were engaged. He and a man by the name of Robinson had formerly owned the premises known as 153 Congress street east, and had sold the same to defendant upon a land contract, and he had had frequent business dealings with her prior to August 9, 1911. Complainant Kincaid was a man 61 years of age, and had been engaged, among other things, in real estate in Detroit and elsewhere. Their principal witness, Fred Rollison, was associated in the insurance business with complainant McKenzie; they occupied offices together, and he was interested also in the sale of the Corunna property. We are satisfied

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from the evidence that complainants went into this deal to obtain possession of these premises in the city of Detroit with their eyes open, and of their own volition, and were not inveigled into it by defendant as claimed.

A careful examination of the testimony in the record satisfies us that they did not rely upon any representations which may have been made by the defendant as to the value of this furniture, and we think they exercised their own judgment in the purchase of the same. They carefully went through the house with the defendant and with the witness Rollison, and an inventory made by Rollison appears in the record, and the values of the articles are therein stated. The pianos appear in that inventory as valued at $400 each. The total valuation stated in that inventory, so made by Rollison, was $1,869. They concede that they took this property subject to the amounts due Crowley, Milner & Co. and Weil & Co. of $2,718. It is very evident that the value of this furniture was not the inducement or moving cause of their making this purchase of furniture and taking this lease from the defendant of the premises. The real object or purpose which they had in view was the lease made with the sister of the defendant, by the terms of which they were to receive from her a rental of $575 a month. It appears that they were to pay a rental to the defendant of $175 per month for the house, and that they turned around and rented to her sister the premises and furniture for this large amount, thus securing, by the terms of the lease, from her for the use of the furniture alone the sum of $400 monthly, or $4,800 yearly rental. This was the real purpose and object of this deal on the part of the complainants. We are satisfied, therefore, that they did not rely upon any representation as to the value of the furniture made to them by the defendant.

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2. Did defendant conceal from the complainants the amount due on the piano contracts, and warrant them free and clear? There is a square conflict in the testimony upon this subject. There are, however, certain earmarks attending the transaction which are not denied by complainants, which are very pertinent upon this branch of the case. It appears that on the day of the transfer to them of this property certain insurance policies were turned over to the complainants by the defendant. These covered the furniture, pianos, musical instruments, etc. These pianos were player pianos of the nickel-in-the-slot machine variety, and had been purchased by defendant (one of them in the name of her sister, who had been her manager) of Grinnell Bros.; and one of the insurance policies expressly provided that the loss, if any, was payable to Weil & Co. and Grinnell Bros. as their respective interests might appear. These policies were turned over to the complainant McKenzie, an experienced insurance man, and he testifies that he did not observe that the policy contained the clause referred to. He claims and testifies that he did not discover that these pianos had not been paid for until on the 19th of August, 1911, when he called at the house. And, while he claims that he made some objection when he learned that the pianos had not been paid for, yet he concedes that he received the contracts from the defendant, and gave her a receipt therefor in the following language:

"August 19, 1911. Received of L. Bell two piano contracts from Grinnell Bros. W. McKenzie & Kincaid."

It appears that these contracts were, by complainant McKenzie, turned over to Beatrice Bell, who was then in charge of the premises under the lease from complainants, and that she made a payment that month on the pianos, as defendant claims, in pursuance of the understanding that Beatrice was to take charge of

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these pianos and make the payments thereon. It is undisputed that complainant McKenzie had helped take the nickels, amounting to $10 in one instance, out of these pianos, and there was testimony that he then understood that these instruments were paying for themselves, and would continue to do so. Matters ran along with Beatrice in possession, running and managing this rooming house under her lease from the complainants, until the police of the city interfered, and closed the house on September 11, 1911. We are of opinion that had there not been police interference this bill of complaint would never have been filed. As we have said, there is a conflict that cannot be reconciled between the testimony on the part of the complainants and on the part of the defendant on nearly every material question involved. On the part of the defendant it is testified to that upon the house being closed the keys of the premises and these identical piano contracts were turned over to complainant McKenzie—left in his office in his presence by Beatrice. This is denied by complainant McKenzie, who seeks to show that the keys and papers were left upon the desk of the witness Rollison in an adjoining room. We do not think the difference here is important. They occupied adjoining rooms, were in the insurance business together, and both had interested themselves in this matter. Whether any of the furniture not belonging to and reserved by defendant was ever taken by her from the rooming house is also a disputed question. Defendant testified that no articles were taken. Complainant McKenzie, when examined upon cross-examination, is not very clear whether any of the articles sold to complainants had been removed or not. He was asked on cross-examination the following question, and made the following answer:

"*Q.* Do you claim there were any of the articles

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that are stated in there (bill of sale) that were gone, that weren't there?

"*A.* Well, all the articles put down I suppose are there yet for all I know. I never have seen them since."

Taking the entire case together, we are of opinion that the complainants have failed to show by any preponderance of evidence that the defendant fraudulently deceived complainants as to the value of the furniture, or that they in any manner relied upon any representations that she may have made with reference to the value thereof. They went into and through the house with their eyes open, and saw what they were purchasing. They were dealing with this defendant at "arm's length," and are in no position to claim, in view of the evidence in the case, that they ever relied upon anything but their own judgment in the purchase of this furniture. Neither can we say from the evidence in the case that the defendant concealed from the complainants the amount due on the piano contracts, or that she ever warranted them free and clear of liens and incumbrances. Upon these two material and controlling points we are of opinion that the complainants have failed to make a case which entitles them to any equitable relief. This renders it unnecessary for us to consider the third point urged by defendant's counsel.

So far as the claim under the cross-bill is concerned, we do not think that any breach of the covenant of warranty and against incumbrances contained in the deed from complainants to defendant is the subject of relief upon a cross-bill.

In our opinion the bill of complaint and the cross-bill should both be dismissed, and the case reversed, with costs to the defendant. It is so ordered.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

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CAMPBELL *v.* RAVEN.

CORPORATIONS—STOCK AND STOCKHOLDERS—NOMINAL SHAREHOLDER'S LIABILITY—ESTOPPEL.

While a subscriber to the capital stock of a corporation is generally bound by his subscription and may not escape liability by transferring his interest to a third party, no liability was established by evidence that defendant, in an action commenced by the trustee in bankruptcy of a corporation, became a subscriber to the stock before the completion of corporate organization for the purpose of accommodating the promoters, and with the understanding on the part of the other stockholders as well as of defendant that his subscriptions should create no liability, and, merely to provide the three required incorporators, signed the articles of association, resigning immediately thereafter as a director and disposing of his stock to a stockholder who had not been able to be present at the time of organization, that defendant supposed he had assigned all his stock, but by mistake retained one share, that defendant took no part in any proceedings after the articles were duly filed and no person dealt with the corporation in reliance on his ownership of stock.

Error to Ottawa; Cross, J. Submitted April 25, 1913. (Docket No. 86.) Decided July 9, 1913.

Assumpsit by Robert L. Campbell, trustee in bankruptcy of the estate of the Kalamazoo Sample Furniture Company, against John H. Raven to enforce payment of a subscription to stock of the bankrupt. Judgment for defendant. Plaintiff brings error. Affirmed.

Cleland & Heald, for appellant.

Diekema, Kollen & Ten Cate, for appellee.

OSTRANDER, J. The cause was tried by the ccurt

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without a jury, and a judgment of no cause of action was entered November 27, 1912, pursuant to certain findings of fact and of law made by the court. Various amendments to these findings were proposed by plaintiff, and later amended findings were made and filed as follows:

"This is an action of assumpsit by Robert L. Campbell, trustee in bankruptcy of the estate of the Kalamazoo Sample Furniture Company, bankrupt, against John H. Raven, on an alleged subscription for stock in a corporation.

"Henry Brusse, George Van Der Veen, and Percy Ray formed a copartnership under the firm name of the Kalamazoo Sample Furniture Company, the business of which consisted of the sale of furniture at retail at Kalamazoo, Mich. Mr. Brusse and Mr. Van Der Veen contributed $2,500 each, and Mr. Ray, $1,000, to the capital stock of the partnership.

"In the fall of 1911 the copartners, Mr. Brusse, Mr. Van Der Veen, and Mr. Ray, decided that they needed more capital to conduct a successful business, and they decided to form a corporation and sell stock and thereby increase their capital.

"Mr. Arthur Van Duren, an attorney of Holland, was employed to prepare the articles of association to form the corporation. He went to Kalamazoo, prepared the articles of association, and proceeded to organize the corporation at the store of the Kalamazoo Sample Furniture Company. Henry Brusse and George Van Der Veen were at the store, but Percy Ray was in Detroit, and his presence at the time could not be obtained. Mr. Van Duren informed Mr. Brusse and Mr. Van Der Veen that it would be necessary to have three persons to sign the articles of association in order to comply with the law.

"The defendant, John H. Raven, who by profession is an auctioneer and was at the time employed by the partnership to conduct auction sales, was in the store and was requested by Mr. Van Duren and Mr. Brusse to sign the articles of association in the place of the absent partner, Percy Ray. Mr. Raven inquired of Mr. Van Duren if by signing the articles of associa-

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tion he would in any manner assume any liability and was informed by Mr. Van Duren that his signing would create no liability against him; that it was a mere matter of form to comply with the law in having three persons sign the articles. Upon this assurance the defendant signed the articles of association. It was understood by all the parties that Mr. Raven was not expected to take any stock or to pay for any stock. It was understood that he was simply to act in the place of Mr. Ray for the sole purpose of having three persons execute the articles to form the corporation. He was not to assume any liability of any kind or nature by signing the articles. The method by which the corporation was formed was ratified by the corporation at the meeting of directors on October 26, 1911. The testimony shows that Arthur Van Duren presented to John H. Raven a waiver of notice of the first meeting of stockholders, which Mr. Raven signed without question.

"The following are the records of the first stockholders' meeting:

"'KALAMAZOO, MICH., Oct. 26, 1911.

"'Meeting of the stockholders of the Kalamazoo Sample Furniture Company, Incorporated, held this day at the office of the company, 317-319 South Burdick street, Kalamazoo, Michigan.

"'Present, Henry Brusse, George Van Der Veen and John H. Raven. Waiver of notice was filed by all subscribers to stock, for the first meeting of stockholders, and thereupon proceeded to organization.

"'Upon motion Henry Brusse, George Van Der Veen and John H. Raven were elected as directors.

"'George Van Der Veen was chosen as temporary president, and Henry Brusse temporary secretary.

"'Upon motion the board of directors were directed to fill the two vacancies on the board as soon as the additional stock was taken; said vacancies to be so filled until the next regular meeting. Carried.

"'Upon motion the following by-laws were unanimously adopted: [By-laws attached.]

"'Upon motion the secretary and president were directed to issue stock in accordance with the several subscriptions. Carried.

"'Upon motion the board of directors were authorized to purchase the business, stock, etc., of the Kalamazoo Sample Furni-

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ture Company, a copartnership, for the sum of $25,000.00. Carried, all stockholders voting therefor.

"'Upon motion the meeting of stockholders adjourned.'

"The records show that a meeting of the board of directors of the corporation was held on October 26, 1911, with Directors Brusse, Van Der Veen and Raven present. The testimony shows that neither Directors Raven nor Brusse were present at this meeting. The records show the following proceedings at said meeting:

"'John H. Raven reported having sold a part of his stock to Percy Ray.

"'Upon motion Percy Ray was elected to one of the vacancies on the board of directors. Carried.

"'The following officers were then elected to serve until the next annual meeting: President, George Van Der Veen; vice president, Percy Ray; secretary and treasurer, Henry Brusse; manager, Henry Brusse.

"'Upon motion the president and secretary were authorized and instructed to purchase the business, stock, leases, etc., of the Kalamazoo Sample Furniture Company, for the sum of $25,000.00 as voted by the stockholders. Carried.

"'John H. Raven reported having sold the balance of his stock, and presented his resignation, which was duly accepted.

"'Upon motion the meeting of directors adjourned.'

"The following is the resignation of John H. Raven, presented to him by Mr. Van Duren, and by Mr. Raven signed without question and without reading:

"'October 26, 1911.

"'TO THE BOARD OF DIRECTORS OF THE KALAMAZOO SAMPLE FURNITURE COMPANY, INC.

"'*Gentlemen:*

"'Having disposed of all stock held by me in your company, I hereby present my resignation as a member of the board of directors, to take immediate effect.

"'Very truly yours,

"'JOHN H. RAVEN.'

"The articles as signed specified that the defendant owned five hundred shares of the capital stock. A certificate of stock was prepared which recited that the defendant was the owner of five hundred shares, and he immediately assigned four hundred and ninety-

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nine shares of the same to Percy Ray, in pursuance of the understanding between those present. He intended to assign all of the shares of stock to Percy Ray and supposed he had done so until he was shown the assignment on the trial of the case. The defendant had no interest in the corporation of any kind and took no part in the proceedings to organize the same, except to sign his name to such papers as Mr. Van Duren requested him to sign.

"The articles of association were signed on the 18th day of October, 1911, and filed with the secretary of State on the 23d day of October, 1911, and with the county clerk on the 18th day of November, 1911. The assignment of the stock from Mr. Raven to Mr. Ray was made on the 26th day of October, 1911.

"The articles of association recited that the name of the corporation should be the Kalamazoo Sample Furniture Company, and that Henry Brusse was the owner of 1,000 shares, George Van Der Veen the owner of 1,000 shares and John H. Raven the owner of 500 shares of the capital stock, and that the shares were paid for in cash. It was not the intention of any of the parties to pay for any of the stock in cash. The defendant, John H. Raven, has never paid anything in in cash or property to the corporation.

"On the 27th day of November, 1911, an amendment was made to the articles of association, which amendment recited that the capital stock of the corporation consisted of $25,000, of which $6,000 was paid in in cash and $19,000 in merchandise and being the entire property and good will of the Kalamazoo Sample Furniture Company, a copartnership. To this amendment of the articles of association is an acknowledgment by Percy Ray, certifying that he is one of the organizers of the corporation. Percy Ray testified that he undoubtedly supposed when he signed said acknowledgment that it referred to the organization of the copartnership, because he considered it one and the same business.

"On the 27th day of November, 1911, an assignment was made for the benefit of the creditors of the Kalamazoo Sample Furniture Company, and afterwards certain creditors filed a petition to have the corporation adjudged a bankrupt, and on the 29th

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day of December, 1911, the corporation was duly adjudged a bankrupt. Proceedings were also taken to have the copartnership adjudged a bankrupt. Schedules were filed in both cases, and the schedules set forth the same creditors and also the same assets; that is, the creditors and assets set forth in the schedules in the bankruptcy proceedings against the corporation were identical with those set forth in the bankruptcy proceedings against the copartnership. Upon a petition filed by the creditors, an order was made by the referee in bankruptcy consolidating the two proceedings, and since the entry of said order the two cases have been conducted as one proceeding.

"The testimony fails to show that any credit was extended to the corporation because of the signing of the articles of association by the defendant, and the proof shows conclusively that the defendant never signed the articles of association with any intention of being bound thereby. The proofs also show that a large percentage of the indebtedness was incurred by the partnership and before the corporation was formed. The defendant has never held himself out as a stockholder in the corporation and he has not been guilty of any laches which would estop him from relying upon his defense in this action.

"It is therefore the opinion of the court that a judgment of no cause of action should be and the same hereby is entered against the plaintiff and in favor of the defendant, with costs to be taxed."

Plaintiff excepted to certain of the findings of fact and to the final conclusion of law, but the grounds of these exceptions are not apparent. As to the findings of fact, it is not asserted that they are not supported by testimony; and, as to the conclusion of law, it is not asserted that it and the judgment are not supported by the findings of fact. Errors are assigned upon exceptions to rulings admitting and rejecting testimony, upon the refusal to make certain amendments to the findings, and upon the conclusion that a judgment for defendant ought to be entered. One of the amendments to the findings proposed by plaintiff and refused was the following:

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"The said defendant, John H. Raven, signed the articles of association of said corporation, agreeing to take 500 shares of the stock of said corporation of the par value of $10 per share, amounting to $5,000. It is therefore the opinion of the court that a judgment of $5,000, with interest from the 26th day of October, 1912, at the rate of 5 per cent. per annum, should be, and the same hereby is, entered against the defendant, John H. Raven, and in favor of the plaintiff, Robert L. Campbell, trustee in bankruptcy of the estate of the Kalamazoo Sample Furniture Company, bankrupt."

The exception to this refusal and the assignment of error based thereon raise the principal and, if decided favorably to defendant, the only question to be considered.

That the judgment is right is a necessary conclusion, whether we consider only the facts found by the court or the facts found and various proposed amendments thereto, which are supported by undisputed testimony. Plaintiff is contending that the controlling fact, from which the liability of defendant, Raven, to pay the par value of the shares is inevitable, is the fact that he deliberately, however mistaken as to the effect, signed the original articles of corporate association as a subscriber for shares.

We recognize the general rule that one who subscribes in the articles of association for shares of stock of a corporation is bound by his subscription. *St. Johns Manfg. Co.* v. *Munger*, 106 Mich. 90 (64 N. W. 3, 29 L. R. A. 63, 58 Am. St. Rep. 468); *Peninsular Sav. Bank* v. *Stove Polish Co.*, 105 Mich. 535 (63 N. W. 514). See *Foote* v. *Greilick*, 166 Mich. 636 (132 N. W. 473); *Union City Lumber Co.* v. *Railroad Co.*, 170 Mich. 205 (136 N. W. 463).

But in the instant case the undisputed facts are that defendant, Raven, while acting deliberately enough, acted with the purpose of accommodating the

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real parties in interest; himself supposing and they supposing that he had and would have no interest in the corporation. He assumed, for the convenience of the interested parties, to act in the place of Ray, but in his own name. No one considered that his formal subscription bound him and that in fact contract relations were established with him. Quite the contrary. Before the corporation was authorized to do business (2 Comp. Laws, § 7045), Raven had, pursuant to the original understanding, assigned his stock, withdrawn from the board of directors, and, so far as was possible, eliminated himself from apparent interest in the concern. Nine days after the articles were filed with the county clerk, amended articles, which were in fact substituted articles of association, were prepared, in which not Raven, but Ray, the man for whom, in the original organization, Raven had been substituted, appeared by recital as one of the organizers, and in which, too, the real terms of the organization were set out. It is not made to appear that any one dealt with the corporation during the interim or that credit was ever extended to it while Raven was apparently a shareholder. In short, the risk which Raven undoubtedly ran of corporate liability incurred while he was apparently a shareholder was escaped without injury. The case is a peculiar one, standing upon its own particular facts.

The judgment is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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ALLISON *v.* TEETERS.

1. CHATTEL MORTGAGES—EQUITABLE REMEDIES—ELECTION.

Under a chattel mortgage executed and filed in the State of Indiana, plaintiff commenced foreclosure of the property, a horse, by complaint: the case proceeded to judgment, which the mortgagor agreed to pay or to turn over the horse before a specified date. He did not surrender possession to plaintiff as agreed, but sold the mortgaged property, which was removed to Michigan, and was conveyed to defendant, a purchaser in good faith, without notice of the mortgage lien. The instrument was never filed in this State: it contained a clause authorizing the mortgagee to take possession of the horse in case of default, and thereupon it should become his absolute property. In the foreclosure proceedings a sale was held pursuant to the order of the court, and plaintiff bid in the horse. *Held*, that, since the purchaser in Michigan obtained title in good faith, plaintiff could not, after foreclosing, exercise his option and take possession under the mortgage, no evidence being produced to show what the law was in the State of Indiana.

2. CHATTEL MORTGAGES.

Persons dealing with the apparent owner of personal property in Michigan are not required to consult the records in another State; without a transfer of the possession of mortgaged property, subsequent purchasers in good faith are not affected by the existence of a mortgage not recorded in this State.

Error to Berrien; Bridgman, J. Submitted April 28, 1913. (Docket No. 56.) Decided July 9, 1913.

Replevin by James Allison against Ira Teeters for a bay stallion. Judgment for plaintiff. Defendant brings error. Reversed.

Coolidge, Riford & White, for appellant.

Burns & Hillman and *J. H. Bibler*, for appellee.

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OSTRANDER, J. Plaintiff at one time owned the horse which defendant claims now to own, and on March 23, 1910, sold it to one James F. Campbell, taking a chattel mortgage on the animal because a part of the purchase price was not paid. The mortgage was recorded in Fulton county, Ind., where the horse then was, on April 8, 1910; the vendee having possession of the horse. In December, 1911, the mortgagee began proceedings in the circuit court for said Fulton county to foreclose the mortgage, the complaint seting forth that said Campbell by his promissory note, made March 23, 1910, promised to pay plaintiff $600 one year after date, and to secure payment executed to plaintiff a chattel mortgage on two described horses, one of them the horse in question, that the note is past due and the conditions of the mortgage broken. The relief prayed for is a judgment for $300, the foreclosure of the mortgage, and an order for the sale of the property therein described. The defendant answered the complaint, and later, and on April 22, 1912, judgment for plaintiff for $230.75 was entered, the mortgage was declared to be foreclosed, and the property therein described was ordered to be sold to satisfy the costs and judgment. A præcipe or writ was issued, directed to the sheriff of said county, by virtue of which, as appears by his return, he sold the property September 17, 1912, at public auction to the plaintiff for $297.05 and returned the writ satisfied.

The testimony tends to prove that when the writ was issued to the sheriff, which was May 7, 1912, the horse was in Campbell's possession. The sheriff did not take the horse, and plaintiff arranged with Campbell that the horse should be turned over to plaintiff, or the judgment paid, on August 14, 1912. Before that date, and after August 10th, Campbell sold the horse to one Jack Prior, who sold it to his brother, Milo Prior, who took the horse to Niles, Mich., on August

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21st, put him in a stable and traded him to defendant August 27th for a three-year old colt, worth perhaps $150, and $125 cash. With the horse said Milo Prior gave a bill of sale, warranting his title. Defendant had no knowledge of plaintiff's interest. Plaintiff finally found the horse in defendant's possession, demanded possession, which was refused, and began this suit. Upon the ground that he was a bona fide purchaser of the horse, defendant asked for a peremptory instruction in his favor. Denying this, the court advised the jury that plaintiff, and not Campbell, had the title to the horse after default, and therefore neither Campbell nor the Priors had any interest to convey to defendant. A verdict for plaintiff was directed.

Apparently, this ruling was grounded upon the provision in the mortgage that Campbell should retain the possession of the horse until the note "hereby secured becomes due," and if it is not paid at maturity "said James Allison shall then have the right to take and keep possession of said property wherever it may be found, without any process of law, and the same shall become the absolute property" of the mortgagee. If we have apprehended the reason for the ruling, it is not, in our opinion, a sound one. We need proceed no further than to say that it appears that the mortgagee, after default, did not exercise, or seek to exercise, any right based upon this provision of the mortgage. On the contrary, without retaking or seeking to retake the animal, he instituted proceedings to foreclose the mortgage, secure a judgment, and sell the horse in satisfaction thereof. Without retaking the horse, he became the purchaser at the execution sale which was made after defendant had bought the horse. We notice, too, that the mortgage gives the mortgagee power, upon breach of the conditions of the mortgage, to retake the property and to sell it to the highest bidder.

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But it is contended by the appellee that the ruling of the trial court is right and should be affirmed because (1) Campbell, under the law of Indiana, had never any title which he could convey, the execution and delivery of the chattel mortgage operating as a conveyance of the absolute title to the mortgagee; (2) by the terms of the mortgage Campbell was a bailee of the horse and could convey no title to it; (3) having agreed with plaintiff to deliver him the horse on a day certain, Campbell was thereafter the agent of plaintiff and held possession for him; (4) the judgment, or decree, of the Indiana court foreclosing the mortgage barred the rights of Campbell in the property and should be held by the courts of this State to be conclusive of Campbell's and of defendant's rights. These propositions may be considered together.

It does not appear that any one having knowledge of the law of Indiana testified to the state of the law upon the point relied upon. It does appear that various reports of the opinions of the supreme court of that State were introduced in evidence. It was held in *Lee* v. *Fox*, 113 Ind. 98 (14 N. E. 889), that:

"A chattel mortgage is at law a conditional sale, which vests the legal title, and prima facie the right of possession, to the things mortgaged in the mortgagee"—referring to previous decisions of the court.

The same case also affirms the doctrine that the right of the mortgagor to discharge the mortgaged property from the claim of the mortgagee after condition broken is abundantly settled.

"Unless the right to redeem has been waived, the mortgagor may assert his right at any time after forfeiture, and before the mortgage has been foreclosed, by paying or tendering the debt and interest, and redeeming the title. This right is called his equity of redemption, which may be barred or foreclosed in either of two ways, at the election of the mortgagee.

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It may be foreclosed by a decree in chancery, or by taking possession of the mortgaged property, and selling it at public auction, in pursuance of legal notice to the mortgagor."

We are not attempting by this reference to the decisions of the supreme court of Indiana to ourselves determine the state of the law in that jurisdiction at the time the chattel mortgage was given. *Lee* v. *Fox* was decided in 1887, and, if the point was material, the law may have been changed since the decision was rendered. Assuming the law to have remained without change, and that in legal effect there was a sale of the horse by Campbell, the mortgagor, to plaintiff, the mortgagee, there was no change of possession of the thing sold.

In this State, and, it may be inferred, in Indiana, when chattels are sold or mortgaged and are not delivered, something is required to stand in the place of change of possession, or else creditors of, and subsequent purchasers from, the vendor, without notice, dealing with the property, are not affected by the sale or mortgage. In jurisdictions where anything is permitted to take the place of the usual change of possession of chattels claimed to have been sold or mortgaged, a public filing or recording of some instrument is required.

And if it is assumed that in this respect, as to the property in question here, the law of Indiana was satisfied, a citizen of this State dealing with the property and its apparent owner in this State is not required to take notice of the records in Indiana. *Montgomery* v. *Wight*, 8 Mich. 143; *Boydson* v. *Goodrich*, 49 Mich. 65 (12 N. W. 913); *Corbett* v. *Littlefield*, 84 Mich. 30 (47 N. W. 581, 11 L. R. A. 95, 22 Am. St. Rep. 681). We hold that defendant's rights are unaffected by the existence and record in Indiana of the plaintiff's chattel mortgage. We do not perceive that defendant's

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rights are in any manner affected by the decree of the Indiana court and the proceedings thereunder. Campbell's possession of the horse, after he bought him of plaintiff, was not disturbed.

Plaintiff has made out no right to the property superior to that of defendant, and the judgment must therefore be reversed and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

MILLER v. CASEY.

1. PARTNERSHIP—REAL PROPERTY—EVIDENCE.
   Complainant's contention, in a suit for a partnership accounting, that his testator was an equal partner in farm property bought in defendant's name, on land contract, deceased paying nothing, and binding himself to no definite time of payment, obtaining no written evidence of the claimed half interest, *held*, not to be established by conflicting evidence.

2. SAME—PLEADING.
   Under a bill filed for an accounting, charging the existence of a partnership arrangement in the ownership and operation of a farm, which theory the evidence did not sufficiently sustain, an accounting could not be ordered as to stock buying and selling in which the proofs showed that the parties had engaged together, since the relief granted must conform to the general theory of the pleadings.

3. SAME—EQUITY PLEADING—REMEDIES.
   It is not enough that the proofs show that complainant is

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entitled to some relief; for unless that is the relief warranted by the averments of his bill, complainant has failed to make out his case.

4. SAME—GENERAL PRAYER.

The general prayer for relief goes no further than to enlarge the special prayer for relief, as the case may warrant. The remedy awarded must always be consistent with the case made by the bill, not different from it.

Appeal from Calhoun; North, J. Submitted April 28, 1913. (Docket No. 89.) Decided July 9, 1913.

Bill by Allen Miller, executor of the estate of Henry W. Miller, deceased, against Garrett Casey for an accounting. From a decree for defendant, complainant appeals. Affirmed.

J. M. Hatch & Sons, for complainant.

Winsor & Miller, for defendant.

STEERE, C. J. In this suit complainant, as executor, filed on July 20, 1911, a bill for an accounting in behalf of the estate of Henry W. Miller, deceased, alleging that the defendant, Garrett Casey, with deceased, purchased and operated a farm in the county of Calhoun, State of Michigan, under a partnership agreement between them that the earnings from said farm should be applied on the purchase price, allowing 5 per cent. per annum as interest on the money advanced by defendant for such purchase; that, at such time as the earnings of the farm had paid the purchase price, Casey should deed an undivided half interest therein to deceased, and they should share equally in the uses and benefits, and increased value of said land. The place in question, consisting of 240 acres of land, is known as the "Duer Farm." It was purchased in 1902, paid for with money furnished by defendant, and deeded to him; he at that time having ready money in the bank available for that purpose.

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Complainant claims that, in pursuance of their agreement of partnership, the farm was bought and stocked by the parties jointly, and that down to the time of testator's death, in November, 1909, said farm was run, managed, and controlled by the two in co-operation; that a prosperous business was done on the place, netting over $1,500 per year, and out of the earnings of said farm the interest on the purchase price of $6,000 has been received by defendant and $4,800 on the principal. It is further claimed that said farm has, since its purchase, nearly doubled in value, being at the time of the trial worth, at a low estimate, $10,000; that at the time of the death of deceased their partnership business was unsettled, since which time defendant, who has possession of the books of said firm, has neglected and refused to come to an accounting. Based on the alleged contract of partnership and the business conducted thereunder, complainant, as executor of deceased, claims to be entitled to one-half of the increased value of the farm and one-half of the earnings, less the balance yet owing defendant on the purchase price.

Defendant, by his answer, makes total denial of any partnership or any indebtedness to said estate on his part. The suit was heard in open court, and after argument of counsel the conclusion was reached by the court that complainant's contention had not been sustained by a preponderance of the evidence; that no partnership in the purchase of the farm, nor interest in its proceeds, was satisfactorily shown, and thereupon dismissed complainant's bill. From such decree complainant has appealed to this court after two motions for a rehearing, which were denied for the reason that the affidavits on which such motions were based were cumulative, in the main, and presented nothing new which would justify the court in granting the motions.

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No written agreement or memorandum in writing of any kind is produced to establish this alleged joint ownership and interest of deceased in the title to real estate, admittedly purchased and paid for by, and deeded to, defendant. Both parties were mature business men of experience in real estate matters, farming and dealing in live stock. They were old associates and friends. Together with two other men named Stage and W. D. Miller, the latter a cousin of deceased, they had been engaged for several years in buying, selling, and shipping stock. The four were the principal stock buyers in that community, and were sometimes called the "Big Four." About 1898 or 1899 the four men started doing business together, and continued up to the time of deceased's last sickness. Of the nature of their relations W. D. Miller testifies:

"About 1898 or 1899 we started in business, the four of us, and continued up to the time of H. W. Miller's sickness. * * * We all had transactions wherein the Big Four had no interest. Wellie (deceased) and Casey were very intimate and worked together. Stage had a business of his own, and they had a business of their own, sometimes Stage & Casey together, and sometimes Stage and Casey separate. We didn't ask one another about it either, we just went and done it. * * * Of course, sometimes I would pay for it myself, and sometimes Stage, * * * and sometimes Wellie Miller, and sometimes they would not pay until it amounted to a few hundred dollars, and then charged interest for it. These matters were all settled up in a few days."

This testimony in its material parts is not disputed, and in a general way indicates a working arrangement between the four in which they harmoniously co-operated as cattle dealers. The cattle they bought and sold were shipped, as a rule, from Marshall, and stock not fit for market, or which they desired to hold

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for any other reasons, was taken to some of their farms and fed for a time.

The testimony as a whole clearly indicates that Casey and deceased were very friendly and intimate, and more often associated in deals together than the others. They rented a farm for a time, and stock which they bought together was put upon it and kept for a greater or less length of time. The same course was followed with the Duer farm. Crops taken from another piece of land deceased owned were hauled to the Duer farm to feed their stock. They also bought feed elsewhere for that purpose. It is undisputed that during the more active period of their stock buying together deceased visited the farm at times, took stock there, and sold stock from there, bought feed for use there, and gave directions to employees on the farm in relation to the stock there.

When we come to the question of his having an interest in the farm itself the testimony is in emphatic conflict. That he could have had a half interest is conceded by defendant. They were interested together in the stock business when the farm was purchased. They talked it over. Defendant bought and paid for it, and it is his claim that at the time he bought it he offered a half interest to deceased if he would take it and pay for it, but that he did not do so, and made no claim to it during his lifetime; that their stock business was independent of the farm and farm purchase, except that their joint purchases of stock were at times taken to this farm, kept and fed, and sold or shipped from there, just as on other farms, owned individually or rented and used in their stock business.

Deceased had other and independent interests which also demanded his attention and means. He bought a livery stable in Marshall in 1903, the year after the purchase of the Duer farm. Complainant,

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his brother, testified that he carried on quite an extensive business in that line for a time; that "he wanted me to brace up and quit drinking, and go in and take care of the barn;" but that he subsequently sold it at a loss. Deceased also drank to excess at times, and for about two years before he died was in poor health and not in condition to as well care for, or as actively engage in, business as formerly. Complainant testifies:

"He was sick a good deal of the time, and was at Mt. Clemens two or three times."

The friendship, interest in each other, and, to a greater or less extent, business relations continued between him and defendant until his death. During his last sickness, when confined to the house, complainant testifies:

"He thought a great deal of Casey; * * * I had a talk with Casey out on my porch the night before the will was drawn. Casey had been there to see my brother. I was talking with Casey, and I said, 'You come and see him just as often as you can, because he is satisfied—he is more satisfied when you are here than when the others are.' "

Defendant did so frequently, apparently taking an anxious and friendly interest in his condition, talking to others solicitously about him, and in response to an inquiry of the attending physician as to his pay said, "You go on, and if he don't pay you I will," which defendant afterwards did. As deceased's condition grew more serious his physician, at the suggestion of complainant and others, spoke to him of the advisability of adjusting his temporal affairs. In talking of them he stated that he wanted no lawyer, and said he and defendant could settle their own affairs. He finally made a will leaving his estate to complainant.

Before the will was drawn complainant asked de-

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fendant as to his business relations with deceased and the condition of their joint interests, and they later had several interviews on the subject. Both testify as to the nature of these conversations, and their lengthy testimony is in direct conflict. Complainant testified that defendant admitted their partnership relations and deceased's interest in the farm, showing an account book marked "Duer Farm," on which was entered their various accounts. Defendant denies having or showing any such book, and produced a bank book containing certain entries which related to the farm, which he claimed was the one he showed complainant, and was the only book he had; denies admitting that deceased ever had an interest in the farm, and claims he explained at length their business relations, and showed they were practically all settled, and he owed deceased nothing.

Various witnesses testified to statements of deceased that he had an interest in the Duer farm, and others to his statements that he had not, and that he had never put a cent in it. Certain of complainant's witnesses testified to statements of defendant that he and deceased owned the farm together. Defendant denies making such statements, and claims that what he did say was that deceased was offered, and could have had, a half interest in it if he had so desired and paid for it; but that he never did take it, never paid a cent upon it, and made no claim to it during his lifetime.

Any detailed review of the lengthy, conflicting testimony of the numerous witnesses would serve no useful purpose. Taking it as a whole, we are impressed, as was the trial judge who heard and saw the witnesses, that it distinctly falls short of satisfactorily establishing a partnership in the purchase and business of conducting this farm, or any ownership or interest of deceased in said realty. The absence of any writing

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upon the subject, while not controlling, is important.

It is true that a court of equity may hold real estate standing in the name of individual partners to be partnership property, where the acts, words, and conduct of the parties show it to have been treated as such, and that such was their thought and intent; but this must be convincingly established by clear, preponderating evidence. This farm was in no sense a contribution by defendant to make up his portion of the capital of the firm, as in *Johnson* v. *Hogan*, 158 Mich. 635 (123 N. W. 891, 37 L. R. A. [N. S.] 889). It was a distinct cash investment in real estate to the amount of $6,000; and the claim is made that, with nothing in writing, without a dollar paid, with no security given, and no definite time of payment agreed upon, and the payments contingent on the farm earning them, the court should find, from this conflicting testimony, that deceased became a partner in the purchase, and the owner of an undivided half of the land. We do not think the court is warranted in so finding.

Much of the testimony relied on by complainant to prove a partnership in the farm purchase is reconcilable with, and tends more strongly to establish, a copartnership in the business of buying and selling stock, extending over a term of years, involving many and varied transactions, and that their accounts were in a confused condition. Defendant himself testifies that he said to complainant:

"No, if you would settle with me square, you would not have a dollar, you would have to put up instead of drawing out, and I said, 'I want to settle this thing, it has been a long transaction between us, and there has never been head or tail to it;' * * * there was a lot of this work done from word to word—'you do this and I will do that,' and nothing to show one way or the other; it was right and wrong with us. He and I knew what we agreed to, but nobody else did. * * * I explained to Miller, of course,

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that it was a long, tangled-up mess, and there was a good deal of honor between us."

This, if properly pleaded, would seem to suggest a proper matter for accounting.

It is the contention of complainant's counsel that, in any event, a partnership in stock dealing is shown, and he is entitled, as a secondary relief, to an accounting as to such relations, under his general prayer for relief, even if the court fails to sustain the allegations of the bill as to the real estate partnership.

The bill is filed on the theory of a partnership in the ownership and operation of this farm, not a partnership in the business of buying and selling stock, and the accounting asked for is "in respect to said copartnership." It nowhere makes mention of any partnership relations, or business transactions, except in the farm venture. Stock dealing is not referred to or suggested in any way. So far as the pleadings warrant it, the court could as well order an accounting in relation to a partnership in the grocery or dry goods business. The bill concludes with the usual prayer "that your orator may have such further and other relief in the premises as shall be agreeable to equity and good conscience," but the "premises" distinctly and only allege, and relate wholly to, a partnership in the purchase and conduct of a farm.

In 16 Cyc. p. 485, it is said, citing numerous authorities:

"Furthermore, it is not enough that the proofs show that plaintiff (or complainant) is entitled to some relief; for unless that is the relief warranted by the allegations in the bill, plaintiff has failed to make out his case. And if plaintiff has framed his bill to adapt it to a certain theory on which he bases his right to recover, the proofs must be such as to warrant a decree in conformity to this theory; and it is not enough that the proofs are sufficient to justify a decree in conformity to some other theory."

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A general prayer for relief goes no further than to enlarge, as the case may warrant, the special prayer for relief; but the relief granted must always be consistent with the case made by the bill, not different from it. *Hiern* v. *Mill*, 13 Vesey, 114; Daniell's Chancery Pleading & Practice, 380. This universal rule has always been recognized in this State. In Puterbaugh's Chancery Pleading & Practice (3d Ed.), p. 27, it is said:

"The court may, under the prayer for general relief, grant him such relief as he ought to have, consistent with the case made in the bill."

The secondary relief asked by complainant is not consistent with the case made in the bill, and for that reason beyond the power of the court to grant under the pleadings.

The decree of the trial court dismissing complainant's bill is therefore affirmed, with costs; but to be construed, of course, as without prejudice to any proceedings he may desire to institute relative to matters not alleged in the bill, though testimony may have been given in relation to some of them.

Decree affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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REAGAN v. MURRAY.

1. COMPETENCY—DEEDS—CAPACITY OF GRANTOR.
   Evidence tending to prove that decedent executed deeds of all his real property to his son, excluding his daughter from any share in his estate, at a time when he had become enfeebled by illness, that he had failed rapidly after the death of his wife and prior to the making of the deeds, that his memory was impaired but he was capable of transacting business understandingly and was active mentally, and well preserved both mentally and physically at the age of 85, *held*, insufficient to invalidate the transfers.[1]

2. DEEDS—BURDEN OF PROOF—EVIDENCE—INCOMPETENCY.
   The complainant, seeking to set aside voluntary deeds of a decedent, has the burden of proving a charge of incompetency by a preponderating evidence, so that evidence which does not prevail over defendant's testimony, or which is so evenly balanced as to leave the issue in doubt, will not sustain the claim of incapacity.

3. GIFTS—TESTAMENTARY DEEDS—PARENT AND CHILD.
   Mere inequality or unfairness between a grantor's children or heirs will not invalidate deeds of his property executed in contemplation of death, if he acted understandingly.

4. DEEDS.
   Held, that the weight of the evidence sustained the capacity of defendant's grantor to make a disposition of his estate by deed.

Appeal from Mackinac; Shepherd, J. Submitted April 14, 1913. (Docket No. 59.) Decided July 9, 1913.

[1] As to the validity of a deed by an incompetent person, see note in 19 L. R. A. 489. And on the question whether a deed of real property executed by an incompetent not judicially declared such may be avoided in action at law, see note in 19 L. R. A. (N. S.) 461.

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Bill by Mary Reagan against Thomas B. Murray for the cancellation of certain deeds. From a decree for complainant, defendant appeals. Reversed.

James J. Brown (Halstead & Halstead, of counsel), for complainant.

Henry Hoffman, for defendant.

STEERE, C. J. The bill of complaint in this suit is filed for the purpose of setting aside, on the ground of fraud and incompetency, two deeds, dated August 17, 1910, executed by Michael Murray shortly before his death, conveying all his real estate to defendant.

Complainant and defendant are brother and sister, and only heirs at law of said Michael Murray, who died at St. Ignace, Mich., on August 23, 1910, at the age of 85 years. He had resided in St. Ignace for over half a century. At the time of his death he was a widower, his wife having died less than a year previous. He owned about 10 acres of land in the city, upon which were five comparatively small and inexpensive dwelling houses; also about 200 acres of land near by, and was possessed of personal property, estimated at from $400 to $500. His last illness was only of about eight days' duration.

Complainant, at the time of the hearing in this case, had been married 34 years, having a husband and six living sons, the eldest of whom was 32 years and the youngest 15 years of age. Her husband, a man of respectability and responsibility, formerly a blacksmith by trade, had been for many years a justice of the peace of the city of St. Ignace, and was then also acting as janitor of the First National Bank of said city.

Defendant was a bachelor 50 years of age, by occupation a woodsman, and was employed at the time of his father's death and for years prior thereto as a

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foreman in the lumber camps of a cousin. He had at times been dissipated, and caused his father much trouble and anxiety, but in recent years appears to have changed his habits. He is crippled in his hands, and, on account of such condition, partially incapacitated for manual labor. He might find it difficult to procure employment with strangers, but had been able, in the employ of his cousin, to earn regular wages as a scaler and foreman.

During his long residence in St. Ignace deceased was known as an unusually strong and vigorous man, mentally and physically, and something of a leading character. He had two brothers, David and Patrick, with whom he was associated in various business activities, including owning and dealing in a tract of land. He had charge of and managed this business for the three. He had held different public offices for many years, having been supervisor of his ward, member of the board of aldermen, and for some 15 years prior to his death a member and secretary of the board of poor commissioners of the county. He was a temperate man, religiously inclined, of strict integrity, and of general good health according to his age. Up to the time of his last sickness he attended to the affairs of his office as secretary of the board of poor commissioners, looked after his own business matters, continued the habits of his life in going daily to the post office, a distance of nearly a mile from his home, and regularly to church, which was about the same distance. He walked to church on August 14, 1910, the day preceding the one on which he was taken with his last illness. The consensus of opinion on the part of all the witnesses, including those of complainant, is that he was a man remarkably well preserved for his age, and, though becoming more feeble and less vigorous as age came upon him, his mind was active and he was capable of transacting his

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business affairs understandingly, was in possession of his faculties, and retained his characteristics of mind up to the time of his last sickness, except that complainant and her husband claim and testify that after the death of his wife he failed rapidly and his memory was perceptibly impaired.

Such testimony, even though undisputed, is not evidence that he was mentally unsound. *Lynch* v. *Doran*, 95 Mich. 395 (54 N. W. 882); *Davis* v. *Phillips*, 85 Mich. 198 (48 N. W. 513). Complainant's husband testified that up to the 1st day of August, 1910, he was mentally capable to transact business and convey his real estate understandingly if he so desired. Counsel for complainant say, in their brief:

"On the issue of mental competency we are asked to believe that up to the time of his death Michael Murray was a man of more than ordinary ability. We are ready to admit—have never denied—that normally, and when he was in active business life, he was a man of fair, average ability, and more or less familiar with the class of business that would likely interest him, including the transfers of real estate; but we do insist that such was not his condition after he was taken sick, or even before that time, but he was failing, mentally and physically, all of the time."

That the burden of years was bearing on him is undoubtedly true, but the testimony is so overwhelming, that up to the time of his last sickness he was fully competent to transact business and make conveyances of real estate understandingly, that we shall spend no further time on that question. That he was a man of independent thought and not easily influenced is strongly established, and the only serious issue in the case is whether or not, after his sickness and at the time he executed the instruments in question, he had so changed and become so enfeebled, both

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physically and mentally, that the execution of the deeds in question was not his own intelligent act in disposing of his property according to his actual wishes.

Deceased and his wife had, prior to her death, lived alone in their own home for many years except as defendant went and came, making his home with them when not away at his employment in the woods.

Up to the time of deceased's death the relations of all the various members of the family were apparently pleasant and harmonious. Complainant had lived for many years at her own home with her husband and children, in the neighborhood of half a mile distant from that of her parents, with whom she and her family frequently visited back and forth, exchanging the mutual help, hospitality, and attentive manifestation of affection, good will, and interest, appropriate and common to such close relations. Deceased had given complainant the lot on which their home was built by her husband shortly after her marriage, and was kind and helpful to the family in many ways, prompted by his interest in their welfare rather than their necessities, for the husband was independent and cared for his family and business affairs. Deceased's wife had been in feeble health for some time before her death, and complainant had been much at her father's house on that account, looking after and helping care for her mother. After the mother's death, the father being left alone and desirous of remaining at the home, where he had lived for many years, complainant with her husband and family moved to her father's home to look after and care for him, as she and her husband claim at the solicitation of defendant and the father; to which defendant does not fully assent, claiming it was their own suggestion, and that the father, though kindly disposed to them, was at times annoyed by, and objected to, the number and noise of the children.

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Defendant became less of an anxiety and more of a comfort to his parents as he grew older. He had been quite regularly in the employ of his cousin for about 12 years before his father's death. When not away at work he lived with his parents, and frequently went home from his work in the woods to spend the Sabbath with them. He helped them in a financial way at times, employing domestic help for his mother after she grew feeble, and procured necessaries or conveniences for the household. During a period of about six years he paid for the care of an afflicted sister, who subsequently died in the State hospital, the cost amounting at times to $26 per month. He had come from the camps and visited his father the day before he was stricken with his last illness. It is clearly shown that deceased was on good terms with, and had paternal affection for, both of his surviving children.

On Monday, August 15, 1910, Michael Murray became seriously ill with an attack described by complainant as "summer complaint" and "general weakness." A physician was summoned who, after examination, expressed the opinion that the patient would not recover. He was a Catholic, so a priest was then called to minister to his spiritual needs and defendant was notified, coming at once by special conveyance and remaining until after the death and funeral. On August 17th the deeds in controversy were executed by deceased in the presence of his brother, Patrick Murray, and a relative named Charles Murray, who had prepared the deeds, was a notary public and took the acknowledgment. On August 18th the parish priest administered the last sacrament to deceased, and on August 23d he died.

The value of the real estate described in the deeds in question was not great. Patrick Murray, the brother, who also owned similar property, estimated

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that in the city as worth $2,000, and stated he had unsuccessfully offered similar land in the country at $5 per acre. Reagan, complainant's husband, estimated the 200 acres outside of town at $20 per acre, and the city property at about $3,000.

There is no direct evidence of fraud or undue influence in procuring the conveyances. The testimony of all witnesses and participants is to the contrary, and to the effect that what was done was at the request and on the initiative of deceased, without prompting or interference from any one. The testimony is also clear that, when normal, deceased was a man of independent and positive views, not easily deceived or influenced. The claim of fraud can only be urged by inference, based on and arising from the claim of mental incompetency, which is the actual issue before us.

The object of this bill being to set aside these deeds on the ground of incompetency on the part of the grantor, primarily the burden of proving the charge by a preponderance of evidence rests upon complainant, and if the testimony does not prevail in her favor, or is so evenly balanced as to leave the question in doubt, her suit must fail. *Brown* v. *Brown*, 39 Mich. 792; *Gibbons* v. *Dunn*, 46 Mich. 146 (9 N. W. 140); *Corby* v. *Moran*, 119 Mich. 272 (77 N. W. 930); *Hayman* v. *Wakeham*, 133 Mich. 363 (94 N. W. 1062); *Behrns* v. *Qualman*, 147 Mich. 635 (111 N. W. 198).

It is urged in behalf of complainant that when it is shown the deeds were made by a very old man, sick and feeble, on his deathbed, and without consideration, the transaction is to be regarded with suspicion, and the burden shifts to defendant to establish its fairness and show that the grantor understood the effect and character of the instruments he signed—citing 13 Cyc. p. 737; *Duncombe* v. *Richards*, 46 Mich. 166 (9 N. W. 149); *Crawford* v. *Hoeft*, 58 Mich. 1

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(23 N. W. 27, 24 N. W. 645, 25 N. W. 567, 26 N. W. 870); *Gates* v. *Cornett*, 72 Mich. 420 (40 N. W. 740); *Brennan* v. *Zehner*, 97 Mich. 98 (56 N. W. 231).

The only testimony directly tending to show that deceased was not competent to understand what he was doing and did not advisedly execute the conveyances is that of complainant and her husband. They testify that from the beginning of his illness he realized but little of what was passing; was at times delirious and at others in an apparent stupor; that he could not raise his head or sit up in bed unaided; that he did not recognize defendant when he returned until complainant roused him and told who it was; and that at no time during his sickness was he mentally in a condition to transact business or understandingly execute a conveyance of his real estate. The husband testifies:

"I know that Michael Murray was never able to make a deed or any other document of any description from the time he laid down until he was buried. I know he was not."

Complainant and her husband were not consulted nor advised of the making of these conveyances, although she was in the house at the time. Neither was defendant present. She testifies that Charles Murray came to the house about 10 o'clock in the forenoon of August 17th, asked as to the condition of her father, said he had been sent for by him to make out some reports, and was told by her to go in and see him; that Patrick Murray was also there, and the two went in together; that the doors were open, and she was around the house, but paid no attention to what was going on; that, having occasion to go into the sick room, she saw Patrick signing a paper which looked like a deed; that nothing was said to her about the matter, except Charles Murray stated, as he was going away, that he could not make out the reports, as he knew nothing about them.

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Defendant testified that on previous occasions his father had told him he intended to deed this property to him, and had asked him to come down from his work on a week day to be present and help him attend to it; that on the morning of the 15th of August, before defendant left for his work, his father spoke of it and wanted him to come down Friday or Saturday of that week to attend to it; that on his return when summoned his father knew and greeted him, was rational, and his mind clear; that defendant was with him much of the time and sat up with him nights; that until towards the last he was able to rise up in bed, noticed and took interest in what was being done; talked with defendant at times of the family, of defendant's mother and her death, and of business matters; again called up the matter of deeding the property to defendant, and directed him to have Charles Murray, who was a notary, make out the deeds and bring them to him for execution, and that defendant did as his father directed; that after the deeds were prepared he gave them to his uncle Patrick, requesting that he go with the notary and act as a witness.

Patrick Murray, brother of Michael, testified that he was between 83 and 84 years of age, that he and his brother always lived close to each other and worked together; that after defendant handed him the deeds he took them to his brother, who read one after the other and then said, "These are all right;" that he asked witness to get his glasses from the dining room, rose up in bed to read and sign the deeds, and after he acknowledged their execution in response to the inquiry of the notary they signed as witnesses; that his brother was all right mentally, as far as witness could see, competent to understand and execute the deeds, and that he did some business relative to the poor board on a later date.

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Charles Murray, the notary, testified that he prepared the deeds at defendant's request, who said his father desired him to do so and to go down and take the acknowledgment; also to attend to some matter pertaining to the poor commissioners; that he went as requested; that complainant came to the door, and Patrick Murray was in the room; that he told deceased he had been requested to come and take an acknowledgment, whereupon deceased pointed to the papers saying, "Yes, the deeds are there;" that witness picked them up, stated to him that they conveyed his lands to his son Thomas, and asked if he wished to sign them, to which he responded decidedly, "I do;" and told witness where to get a pen and ink, raised himself up in bed, took a book witness passed him to write on, and signed the deeds, after which they were witnessed and acknowledged. That to all appearance his mental condition was good and he was competent to do what he did; that when he handed them back to witness after signing, he said, "These deeds are all right."

The doctor and parish priest who attended deceased testified that he appeared all right mentally, and they discovered nothing to attract special attention in that particular. John Murray, a nephew living near by, went in and out more than once daily to see his uncle during his sickness, and when there conversed with him on various topics, which he discussed intelligently. He testified, "I would consider he was compentent to do any kind of business up to three days before he died." Two days before he died a next door neighbor by the name of Quinn, who had known him for many years, called and inquired about him. He testified that deceased, hearing his voice in the adjoining room, called out to complainant and asked who was there. On being informed, he requested that Quinn come in as he wanted to see him; that he then

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raised himself up in bed, refusing witness' assistance, saying, "No, I can help myself yet, thank God;" that they visited for about 10 minutes, and deceased talked rationally, manifesting no mental weakness. Another nephew named P. W. Murray, who visited him the day before and the day after the deeds were executed and talked with him on various subjects, saw him sitting up in bed, and testified that he was perfectly competent to execute deeds or transact any business. A niece, who lived within 100 feet and was in to see him several times a day during his sickness, testified that she saw no difference in his mental condition from what it had been for some time before his illness.

Counsel for complainant cite *Noban* v. *Shoup*, 171 Mich. 191 (137 N. W. 75), as an analogous case, and refer to the following language as particularly appropriate:

"The record discloses no reason why the father should have deeded to the defendant all the estate he had in the world (with the exception of a very small amount of personal property), to the practical exclusion of his only other child, the complainant."

There are matters disclosed in this record which might have been thought sufficient reason by deceased. Defendant was and always had been a member of his father's household and had no other family ties. He was crippled, and the father had expressed doubts if others than a relative would give him employment; he had helped his father at times, and for six years bore the burden of the care of an afflicted sister. Complainant had a home of her own, with a husband and six sons, who could and did provide for her.

That the execution of these deeds was but the carrying out of a previous purpose is indicated. De-

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fendant so testified; and P. J. Murray, a nephew, shown to be a prominent and responsible business man, testified that he not only visited and talked with his uncle during his sickness and found his mental condition clear and good, but that on former occasions his uncle had expressed his purpose to give this property to defendant; that on August 8, 1910, he had stated to witness that he wanted defendant to come down on a secular day of the week, saying:

"He has been coming down here Saturday night and back Monday morning and I can't do anything; I wanted to deed this property to him for these last two years, and he would keep putting it off from time to time."

If this testimony is true, and there is nothing in the record to impeach it, the execution of the deeds was but the carrying out of a previously expressed and long delayed purpose which he had entertained for at least two years.

If deceased acted understandingly he had a right to dispose of his property as he saw fit, even though it might be inequitable. In *Beadle* v. *Anderson,* 158 Mich. 483 (123 N. W. 8), this court said:

"The fact that a division is not equal between children regarded apparently with equal affection is no sufficient reason to disturb a disposition of property so made, as has been many times declared."

The parties and their witnesses in this case appear from the record to be all respectable and intelligent persons, mostly related, and it is to their credit that the testimony shows much less acrimony, bitterness, and unkindly recrimination than is usually manifested in this class of cases. There is a conflict in their testimony which cannot be reconciled. No disinterested witness testifies to Michael Murray's incompetency. With the exception of defendant, those testifying to his soundness of mind are disinterested,

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so far as shown, had ample opportunity to observe and reason to know, give convincing detail of time and circumstance, and, beyond the bare statement of adverse facts and opinion, manifest no bias or unkindly feeling towards complainant.

Assuming that all the witnesses are equally credible, and applying the rule of preponderance of evidence, we are constrained to conclude that the greater weight of evidence is adverse to complainant's contention, and the decree of the lower court is reversed, and bill dismissed, with costs.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ concurred.

SCHOOL DISTRICT NO. 2 OF SYLVAN TOWNSHIP, WASHTENAW COUNTY v. MUSBACH.

1. EQUITY—JURISDICTION—REAL PROPERTY—VALUE.

   Equity will not dismiss a bill to quiet title for want of jurisdiction, if the evidence does not disclose that the value of the property in dispute is less than $100; the fact that the parties to the litigation entered into a tentative settlement or compromise of the questions in dispute fixing a less value than $100, subsequently failing to act upon the agreement, will not control the matter of jurisdiction even if the evidence of compromise is competent.

2. QUIETING TITLE—POSSESSION.

   A bill to quiet title cannot be maintained against a party in possession. Act No. 256, Pub. Acts 1909 (4 How. Stat. [2d Ed.] § 11965).

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3. SAME—FRAUDULENT TAKING POSSESSION.

No such fraudulent or forcible assumption of possession appeared as to deprive defendant of his right to make claim thereto in a case in which he had openly advised complainant of his claim to ownership, and threatened to fence in the land, and later without using any force enclosed the land with other property held by him, having the record title of the parcel in dispute.

Appeal from Washtenaw; Kinne, J. Submitted April 18, 1913. (Docket No. 93.) Decided July 9, 1913.

Bill by School District No. 2, Sylvan Township, Washtenaw County, against Henry Musbach and another to quiet title to real property. From a decree for complainant, defendant appeals. Reversed.

Stivers & Kalmbach, for complainant.

A. F. & F. M. Freeman, for defendants.

STEERE, C. J. Complainant filed its bill in this case for the purpose of removing the cloud from the title of a small triangular piece of land, consisting of about one-eighth of an acre, alleged to be a portion of its schoolhouse grounds. Complainant's schoolhouse is located between four and five miles west of the village of Chelsea, in Washtenaw county, on a site in the extreme northwest corner of section 17, town 2 north, range 3 west, facing west on a highway running north and south on the section line. It is conceded complainant owns about one-quarter of an acre of land in the corner of said section, upon which are located the schoolhouse, woodshed, some shade trees, and other appurtenances of a typical country school. The triangle in controversy joins this on the north, being in section 8, and described as—

"Commencing at post on section line between sections 8 and 17 where the wire fence, running along

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the east side of schoolhouse, intersects said section line, and running thence west 85 feet; thence north 122 feet; thence southeasterly to the place of beginning, being a triangular piece of land located in southwest corner of the west half of the southwest quarter of section 8."

Said district No. 2 was organized in an early day, and has maintained a schoolhouse upon its present site for 50 years or more. Defendants reside on section 8, 50 or 60 rods north of the schoolhouse site, owning 60 acres of land in the southwest quarter of said section.

One Christopher Herzer, defendants' predecessor in the regular chain of title was, from an early date until he died in 1878, the owner of the land in section 8, north of the schoolhouse, of which the disputed triangle was the extreme southwest corner. This triangle, together with the lands adjoining, was for many years wild timber land, mostly unfenced, lying open to the public highway; there being no fence between sections 8 and 17. The triangle was a somewhat hilly piece of land, sloping to the north, and from the time the school was established there the children used it, and as much of the adjacent woods to the north as they desired, for a playground in connection with the school grounds—coasting upon the hilly part in the winter, sometimes breaking down the small trees and bushes. With a view to using his wood lot as a pasture, Herzer, in 1874, erected a fence along the north and south highway between sections 7 and 8 to within 122 feet of the section corner at the northwest of the schoolhouse, and from there, leaving this triangular piece open to the school grounds and highway, so that the school children could use it as a playground, he ran his fence diagonally southeast to a point on the north line of section 17, where complainant's east line intersects said line. The testimony seems quite clear that he left this small, tri-

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angular piece of ground adjoining the balance of the schoolhouse site unfenced and open that it might be used as a playground by the children, for the time being at least, hoping that they would confine their activities to that side of the fence and refrain from trespassing upon his land at the rear.

It is the claim of complainant that Herzer at that time donated this triangle to the school district as a playground, that it was in possession of the district, so used and occupied, for over 15 years, and until defendants took possession in 1910 and fenced it in with their adjacent farm, at a time when the school district had become the rightful owner by donation and prescription; that defendants' possession was therefore tortiously taken, and has since been unlawfully held. On the part of defendants, donation to and adverse possession by complainant is denied; a clear chain of title to the land is shown to be in them by mesne conveyances of public record up to the time of commencing this suit; it is contended that the value of the property is less than $100, hence below the jurisdiction of a court of chancery, and a bill to quiet title must fail because it is alleged in complainant's bill, and shown by the evidence, that at the time of beginning suit defendants were in possession of the land in dispute.

There is some conflict in the testimony as to the exact size of this triangular piece of land, the only importance of which, if any, is its bearing on the value of the tract. The record shows that at one stage of this litigation the parties wisely entered into a stipulation of settlement by which the school district was to secure the triangle in dispute, with approximately as much more land, for $125 and $20 costs, but unwisely failed to consummate the deal, and the suit went on. This is urged by the defense as sufficient evidence of value, not directly of the land in contro-

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versy, but of the same class of land adjacent, to warrant the court in dismissing the suit because the amount involved is shown to be less than $100. That its value is small is evident, but certain of complainant's witnesses place the same at over $100. We are not satisfied that values shown by the terms of a tentative settlement should be considered, or, even if entitled to be recognized as evidence, should control.

It is shown by the testimony of various witnesses called by complainant that Herzer said, at about the time he fenced in the adjacent land and left this piece uninclosed, "that he was going to give this triangular piece of land to the school district," and later said that he had done so; that he at one time told a teacher that he had given the land for a playground, and the children had ample room to play there, with trees to swing on, and he desired the district to see to it that teachers kept them out of his woods. We find no evidence that they did so, or that there was any formal acceptance or recognition of the gift by the school authorities. The children played there as before; the triangle lay open to the road, the schoolhouse yard remained as before, and no other or different acts of ownership or possession on the part of complainant are shown; no care or attention was given it by the school authorities.

Defendant Henry Musbach acquired title to the property from his father, in connection with the adjacent land in 1905. He and his father cut timber from it from time to time as they saw fit, without protest from any source. He rebuilt the old diagonal rail fence, inclosing the land back of it, when a better fence was needed, and the children continued to play there undisturbed. In 1910 he built a new wire fence along the boundary lines of his land, and "squared up" his farm, as he testifies, by following the section lines, and including the triangle to which he had the record title, and which he claimed to own.

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In the meantime, seven or eight years before he inclosed the triangle with his other land, the school district officers, for the purpose of beautifying and improving the schoolhouse grounds, planted trees around the premises, set at uniform distances inside the boundary lines, and on the north side of the schoolhouse set a row of trees on the south side of the section line forming the south boundary of the triangle. Two officers of the school board directed and assisted in planting these trees. They planted none upon the triangle.

In 1911, a year after Musbach had inclosed the triangle with the adjacent land, it was decided and voted at a school meeting to build a new fence around the schoolhouse site. The school director thereupon employed an old resident of the district, who himself had formerly been a school officer for many years, to build this fence. He built a new fence on three sides, leaving the front along the highway open, and in doing so took up the fence defendant Musbach had built on the section line on the north, replacing it with a new fence, uniform with the rest of the fence around the schoolhouse. Certain residents of the district raised the question of defendants' right to this triangle shortly after he inclosed it, and at a school meeting held July 11, 1910, the record shows:

"Motion to take a vote whether Musbach move his fence or not. Motion carried."

Following this, the fence Musbach had built was replaced, as before stated, on the south side of the triangle, leaving defendants in possession of the same. It was later claimed by some that this was without authority and by mistake, and at a school meeting held in July, 1911, a resolution was passed reciting that "Henry Musbach has taken possession of a portion of the school lot belonging to the district," and authorizing the school officers of the district to "take

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such legal steps as may be necessary to recover possession of said premises."

On February 12, 1912, this bill was filed to quiet title, stating, amongst other things, that complainant "is in the legal possession of the absolute title in and to said premises," and quoting, apparently as authority for commencing suit, the resolution above referred to, which states in unequivocal language that Musbach "has taken possession" of the premises and authorizes legal proceedings to "recover possession."

That a bill to quiet title cannot be maintained by one out of possession against one in possession is not open to question. 1 Comp. Laws, § 448 (amended Act No. 256, Pub. Acts 1909, 4 How. Stat. [2d Ed.] § 11965), and authorities there cited; *Moody* v. *Macomber*, 158 Mich. 209 (122 N. W. 517). This question was early raised in the case by defendants' answer, denying possession by complainant, alleging possession in themselves before and at the time of commencing suit, and claiming the right of demurrer on the ground "that it does not appear by the bill, as filed, that the same is a proper bill of complaint to be filed in such cases." On the hearing of the case, after complainant's solicitor had made his opening statement, defendants' solicitor objected to any testimony being admitted because, amongst other things, "there is no equity in the bill; * * * the bill of complaint, under the statement of counsel as already made, does not state a cause of action," and "if the statement of counsel be true the complainant has an adequate remedy at law." It is clearly apparent from both the pleadings and proofs in this case that at the time suit was commenced defendants were in the actual, open, physical possession of this triangle, under a claim of ownership, and that complainant was out of possession.

"Under such conditions, a bill filed merely to quiet

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title cannot be maintained." *Beidler* v. *City Bank of Battle Creek*, 172 Mich. 381 (137 N. W. 717).

It is contended in behalf of complainant that the possession of defendants is not sufficient to be considered and prevail under the foregoing rule, because it violated complainant's prior possession, was acquired by sharp practice, and taken unlawfully by force and fraud (citing 32 Cyc. p. 1342; *Bigelow* v. *Sanford*, 98 Mich. 657 [57 N. W. 1037]). The only proof of any possession by complainant is that the school children used the land as a playground when it lay open, unfenced, and as a commons. Musbach claimed ownership, and had threatened to the members of the school board that he would fence it in some time before he actually did so. Holding the legal title, and under a claim of ownership, he inclosed this tract, previously uninclosed by any one, with his other land, openly, without force against any one in possession, and by peaceful measures. It was not done surreptitiously, by force or trick or fraudulent representations practiced on those who otherwise might have maintained a previous possession. Under the facts in this case the authorities cited by complainant are not in point.

For the reason stated the decree of the lower court must be reversed, and complainant's bill dismissed, with costs to defendants.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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PAUL v. CLEMENTS.

1. EVIDENCE—TRIAL—CROSS-EXAMINATION.
   On rejecting the direct examination of certain expert witnesses as to the sanity of deceased testatrix, the court should have excluded their cross-examination, for which no foundation remained in the case.

2. SAME—TRIAL—REDIRECT EXAMINATION.
   It is within the discretion of the trial judge to limit the redirect examination of an expert to matters developed on direct examination: the sustaining of contestant's objection to an explanation on the part of a medical witness, upon redirect examination, how he reached his conclusion as to the insanity of testatrix was not reversible error, in proceedings for the probate of a will.

3. SAME—WILLS—COMPETENCY.
   Excepting witnesses to a will, persons are not allowed to offer mere opinions as to the insanity or mental incompetency of a testator, but conclusions derived from actual observation and conversation with a decedent are admissible in connection with facts testified to by the witnesses which have a tendency to support their conclusions.[1]

4. SAME—OPINIONS.
   And if all the facts stated by a witness considered as a whole tend to show unsoundness of mind, the opinion of the witness may be admitted.

5. WILLS—WITNESSES—EVIDENCE.
   Where a neighbor of testatrix who had known her for more than 20 years gave testimony tending to show that decedent frequently used vulgar and profane language, talked in a rambling manner, being nervous and flighty and of failing memory, that she had complained of peculiar sensations in her head and feared she might be going crazy, that she told fortunes with cards, declared she had

[1] On the question of nonexpert opinions as to sanity and mental capacity, see note in 38 L. R. A. 721. And for opinion evidence by nonexpert as to the contractual or testamentary capacity of another, see note in 37 L. R. A. (N. S.) 591.

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made many wills and claimed to hold conversations with her deceased husband and others not living, the court should have permitted the witness to give her opinion concerning the sanity of the testatrix.

Error to Muskegon; Sullivan, J. Submitted April 21, 1913. (Docket No. 98.) Decided July 9, 1913.

Minnie Ham Paul presented for probate the will of Helen E. Sossoman, and on appeal to the circuit court a judgment was entered admitting the instrument to probate. Contestant Emma Clements brings error. Reversed.

John G. Anderson and *Slick & Slick*, for appellant.

Cross, Vanderwerp, Foote & Ross and *W. G. Crabill*, for appellee.

STEERE, C. J. Emma Clements, the contestant and appellant herein, is a sister of Helen E. Sossoman, deceased, whose will was admitted to probate in the probate court of Muskegon county on April 9, 1912. At the time of her death, testatrix was a resident of Whitehall, in said county. The will in controversy was executed by her on June 5, 1906, at the city of Mishawaka, Ind., where she was then residing and had made her home for many years, having previously moved there from Whitehall, to which place she returned, and there resumed her residence not long before her death. At the time she executed this will she was 57 years of age, a widow, and had no children. She had been twice married, and at the time of her death had an estate worth between $5,000 and $6,000, a portion of which she had inherited from her last husband and a portion she had saved by economy and frugality. By the terms of her will she left her property, consisting of personal estate valued at $4,720 and a house and lot in Whitehall valued at $1,200, to

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her niece, Minnie Ham Paul, the proponent herein, excepting $300 to her sister, Emma Clements, the contestant herein, and $100 to a niece named Eva Smith. Appellant contested the probation of said will, and appealed from the order of the probate court to the circuit court of Muskegon county, alleging the following reasons why said will should not be probated:

"*First.* Said instrument in writing allowed and admitted to probate is not the last will and testament of said Helen E. Sossoman, deceased.

"*Second.* That said instrument in writing was not executed according to the formalities required by law for the execution of wills.

"*Third.* That at the time of the execution of said instrument so admitted to probate as aforesaid the said Helen E. Sossoman was mentally incompetent to make a will.

"*Fourth.* That the execution of said instrument so admitted to probate as aforesaid by said Helen E. Sossoman was procured by undue influence upon the said Helen E. Sossoman."

The case was tried in the circuit court for Muskegon county before a jury, and a verdict rendered sustaining the will. On the trial in the circuit court appellant based her contention entirely upon the claim that testatrix was insane and mentally incompetent to intelligently execute a will at the time the one in question was made. On said trial proponent in the first instance, to prove the will, introduced the testimony of one subscribing witness, Harvey W. Jones, an attorney of Mishawaka, Ind., who had been testatrix's attorney at Mishawaka and drew the instrument at her request. He gave the requisite testimony to establish the validity of the will in the absence of anything to the contrary, after which proponent rested, and contestant proceeded with a large amount of testimony, raising the question of the sanity and competency of testatrix. The record in this case contains

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the testimony, in part at least, of five of contestant's witnesses who testified in the case, two by deposition, and three sworn and examined in open court. Thirty-three assignments of error are based upon the admission or rejection of testimony in connection with their examination. The charge of the trial court does not appear in the record, and therefore no question is raised in relation to the same. The record discloses that besides the five witnesses whose testimony is the subject of inquiry here, contestant produced and examined ten others, residents of Mishawaka, Ind. In rebuttal proponent introduced the depositions of 16 witnesses who were residents of Mishawaka and five witnesses from the same place who were examined in open court, together with six witnesses who were residents of Whitehall, Mich. We therefore get from the record a comparatively small amount of the testimony taken, and little understanding of the merits of the controversy as developed by the evidence of the many witnesses who testified on the necessarily lengthy trial before the jury.

The questions raised involve technical rules of evidence as to the rejection and admission of testimony. Many of them are not of such a nature that, with the record presented, we are able to say the rulings of the court were erroneous; or, if technically tending in that direction, that the possibly technical errors were sufficiently prejudicial to call for a reversal in a case of this kind.

Appellant's assignments of error have been conveniently and correctly grouped by counsel as follows:

"(1) Error of the trial court in sustaining the objection of the attorneys for the proponent to the questions propounded to certain witnesses for the contestant, calling for their opinion as to the competency of the deceased to make the will in question.

"(2) Error of the trial court in sustaining the objection of the attorneys for the proponent to the ques-

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tions and answers of certain witnesses for the contestant on cross-examination; the testimony of the witnesses having been taken by depositions at South Bend, Ind.

"(3) Error of the trial court in sustaining the objection of the attorneys for the proponent to certain redirect examination of the expert witness, Dr. Mueller."

The second of these requires but little consideration. If objections to the testimony on direct examination were properly sustained, such testimony was not, and should not be, in the case for the witnesses to be cross-examined upon, and the questions and answers in the depositions, constituting such cross-examination, were properly excluded. *Baker* v. *Temple*, 160 Mich. 318 (125 N. W. 63).

Contestant produced Dr. Wm. D. Mueller as an expert witness, and propounded to him a very lengthy hypothetical question containing a statement of many facts relative to testatrix, including her family history and relations, and incidents of what she had done and said at certain times under certain circumstances, asking his opinion as to her sanity, assuming the facts recited in said question to be true. Witness, having been allowed to answer, against objection, was cross-examined at length upon the subject by counsel for proponent, and re-examined by counsel for contestant, who, amongst other questions, asked the following:

"Now, Doctor, in order to enlighten the jury, I would like to have you explain to them how you arrive, in your practice, at a conclusion as to whether a person is sane or insane, whether it is some detached and single incident or instance, or whether from collected, a collection of incidents or instances."

Objection to this was sustained and error is assigned on such ruling. The question called for no facts, no opinion, and no answer as an expert to any hypothetical question. As introductory matter, or

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even in explanation and amplification of his opinion, an answer within certain limits could properly be allowed in the discretion of the court, but the allowance of such questions on re-examination is discretionary, and we cannot say on this record that there was an abuse of discretion.

The most serious question presented is the refusal of the court to allow certain nonexpert witnesses, who were well acquainted with testatrix, and who testified to various peculiar facts and circumstances in regard to her, to express any opinion as to her mental competency. This question has frequently been before the courts of last resort, and in time past has been the subject of much discussion and some diversity of opinion. The decisions of different jurisdictions are not all yet in harmony. While an exception to the general rule, the opinion of nonexperts, where proper foundation of personal knowledge is laid, is allowed in this and most of our sister States. When the issue of *devisavit vel non* is raised it opens, like the issue of fraud, a wide field of inquiry, relaxing in many particulars the more stringent rules of evidence, opening the door for sidelight testimony which in other kinds of litigation would be regarded as too remote. The serious subject of consideration in relation to such evidence in such cases is its weight rather than its competency. Recognizing the difficulty of the ordinary witness communicating to a court and jury a correct understanding of all the many facts and circumstances, great and small, which, to the actual observer, properly lead to conclusions as to the sanity of a person, the witness who has had ample means to observe and form conclusions as to the mental condition of a person, and who testifies to pertinent facts on which his conclusions are based, may supplement the same by stating what such conclusions are, for whatever aid it may be to the jury, who, from all the

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testimony, are to ultimately form their own conclusions and decide the issue.

In Buswell on Insanity, §§ 240-243, it is said:

"Except in the case of the attesting witnesses to a will, the mere opinions of persons not experts are inadmissible as evidence upon the question of a party's insanity. But it is held generally in the American courts, when a person's mental condition or capacity is in question, that the opinions of nonprofessional witnesses in regard to such capacity, derived from personal observation of, and conversation with, such person, are admissible in evidence when taken in connection with the facts upon which such opinions are founded. * * * To lay a foundation for the admission in evidence of such opinions, the specific facts upon which the opinions are based must first be stated by the witness, or his testimony must show that such intimate and close relations have existed between the party alleged to be insane and himself as fairly to lead to the conclusion that his opinions will be justified by his opportunities for observing the party. But the mere 'impressions' of one who has had only a passing acquaintance with the party are inadmissible as evidence. * * * Thus it seems that opinions, though admissible with the limitations stated, are only to be considered as of weight so far as they illustrate the character and effect upon the mind of the witness of the facts on which they are based."

The rule is fully recognized in this State in numerous decisions. *Beaubien* v. *Cicotte,* 12 Mich. 459; *Prentis* v. *Bates,* 93 Mich. 234 (53 N. W. 153, 17 L. R. A. 494); *O'Connor* v. *Madison,* 98 Mich. 183 (57 N. W. 105); *In re Hogmire's Appeal,* 108 Mich. 410 (66 N. W. 327); *Lamb* v. *Lippincott,* 115 Mich. 611 (73 N. W. 887); *Page* v. *Beach,* 134 Mich. 51 (95 N. W. 981); *Roberts* v. *Bidwell,* 136 Mich. 191 (98 N. W. 1000); *In re McMaster's Estate,* 163 Mich. 210 (128 N. W. 259). That the rule must be guarded against abuse has also been distinctly stated more than once. In *Page* v. *Beach, supra,* it is said:

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"The practice of proving by a witness two or three instances of tears, forgetfulness, anger, or some other emotion or idiosyncrasy, of doubtful significance, as a ground, and then taking the opinion of the witness (frequently biased) that the person is insane or incompetent or without sufficient understanding or intelligence to do the act in question, is contrary to the rule, as we have often said."

Unquestionably the witnesses must narrate sufficient abnormal or eccentric conduct on the part of the person under inquiry to qualify them to express an opinion, and it is for the court to determine whether or not they have done so.

In the case at bar the court did not allow three of the witnesses whose testimony is given in the record to express an opinion as to deceased's mental condition, on the theory that they had not stated any fact from which insanity could be inferred. It is contended that this ruling is according to the test stated in *Lamb* v. *Lippincott, supra,* wherein it is said:

"Before one is competent to say that another is insane, he must state some fact that is inconsistent with sanity; and this is not done until the witness is able to testify to something that the man has said or done which fairly tends to show insanity."

This language is not to be construed as meaning that a witness does not qualify unless some one distinct fact, considered alone, fairly tends to show insanity, but that all the facts stated by the witness, considered collectively and as a whole, must tend in that direction. In *Beaubien* v. *Cicotte, supra,* it is said:

"In many cases the facts which can be described will be very significant to a jury, while there are many facts susceptible of a different interpretation, from which a jury could obtain no light whatever without the aid of the witness' judgment. The strongest indications of mental weakness or aberra-

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tion often exist in expressions and appearances incapable of reproduction, even by an accomplished mimic; and yet decisive to any intelligent eyewitness."

The three witnesses referred to are all shown to have lived near, and been well acquainted with, deceased for years, to have had such relations with and knowledge of her as to give full opportunity to judge and form conclusions; they all related specific facts which, taken together, denoted eccentricity more or less pronounced, appealing to them as indication of mental unsoundness. Whether their conclusions were well founded was a fair question for the jury, but they were not strangers with limited means of observation and but a passing knowledge, as in the case of *Page* v. *Beach, supra,* where the witness was allowed to express an opinion after having seen deceased but once, and for a short time. While the testimony of two of the witnesses in question is of such a nature that there might be room for debate as to whether or not the facts they related clearly tended to show insanity and consequently the rejection of their opinions reversible error, we are constrained to conclude, under the authorities referred to, that the witness Mary Scheibelhute clearly qualified to express an opinion and contestant was entitled to her answer. She had known testatrix from 20 to 22 years, seeing her frequently and living for some years a next door neighbor, visiting back and forth, was well acquainted and familiar with her, and testified, among other things, to her talking in a rambling manner, jumping from one subject to another; that she was nervous and flighty; that she told of having fallen upon her head some years before, and in telling of it said she had "nearly broken her d—n neck;" that she would not care if she had as her head felt mean, and she believed she was going crazy; that she was in the

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habit of telling fortunes with cards and talking extravagantly about her property and her wills, stating in that connection she thought she was losing her mind; that she had made so many wills she could not tell the number—had made one in favor of William Ham, and one in favor of Jim Clements, and one in favor of Minnie Ham, and then said, "Good G—d, I don't know how many more wills I will make;" that she told of having seen and talked with persons who were dead; that, on one occasion, she told witness she had talked with Bill Guyer, her former husband, who had then been dead 10 or 12 years, and stated that he had admonished her "to take care of the children," though they had never had any children; that she was apparently offended at her dead husband's remarks about children, and stated that if she had him then available she would "kick him all over hell," and when witness expressed doubts of the actuality of the interview related replied she did not care whether witness believed it or not, that she "knew what she knew;" that during the years witness knew her her memory failed materially, and she became more rambling in her talk, did not tell a story twice alike, and as she grew older it seemed harder for her to understand anything said to her.

We think that the witness testified to sufficient facts to justify the alleged inference of incompetency and qualified as a nonexpert opinion witness.

The judgment must be reversed, and a new trial granted, with costs in favor of contestant.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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SAILSKY v. DETROIT UNITED RAILWAY.

1. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE — STREET RAILWAYS—DEATH.

   Whether the driver of a vehicle was guilty of contributory negligence, in crossing a wye track of defendant street railway company in front of a car, relying on an alleged custom of the cars to stop at that crossing, was a question of fact.

2. SAME—STREET RAILWAYS—OPERATION OF CARS.

   The question of the negligence of defendant's motorman in colliding with the wagon on which decedent was riding, *held*, properly submitted to the jury under disputed evidence.

Error to Wayne; Hosmer, J. Submitted April 14, 1913. (Docket No. 58.) Decided July 9, 1913.

Case by Frances Sailsky as administratrix of the estate of Anthony Sailsky, deceased, against the Detroit United Railway for the unlawful killing of decedent. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Joslyn (Frederic T. Harward, of counsel), for appellant.

John E. Maloney, for appellee.

BIRD, J. Plaintiff's intestate belonged to a gang of men constructing cement work in the city of Detroit. Having completed a job on Trumbull avenue, the men loaded their construction outfit, consisting of tool box, screen, planks, wheelbarrows, bags of cement, etc., onto a wagon and climbed on top of it and started for the next job on Baltimore avenue. To reach that point they drove north on the east side of Greenwood

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avenue, and when near the "Y" track which connects the Greenwood avenue line with the Holden avenue line one of the men announced that a car was coming. Cunningham, the driver, who was not as familiar with that locality as his fellows, turned to see where the car was in order to determine whether he could cross the "Y" track in advance of the car, when he was told by his companions to "Go ahead, you can make it, the car stops here." The horses were then on the "Y" track and he drove on, but before the wagon cleared the car ran in on the "Y" and one of the stanchions on the open car engaged the handles on the tool box and threw plaintiff's intestate and the tool box upon which he was sitting to the pavement, injuring him so badly that he died the following day. The negligence complained of was the careless and reckless management of the car. At the close of the proofs the defendant moved for a directed verdict on the grounds that the plaintiff had failed to establish the negligence of the defendant, and because the proofs showed that the driver of the wagon was guilty of contributory negligence. The court declined to control the verdict, but submitted both questions to the jury, who found a verdict for plaintiff. The defendant's assignment of errors are based upon these two propositions:

Was the driver of the wagon negligent? While the driver of the wagon was a comparative stranger to the custom of the cars in that vicinity, his companions, Seldon and Lemke, were familiar with it, and they testified that all cars stopped at this point and then went across the "Y" track and east on Holden. It was also shown by them that the defendant had for some time maintained at this point a car barn, a waiting room for passengers, a large air tank from which the car tanks were refilled, and an office where the conductors filed their reports. In this they

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were corroborated by the tradesmen who do business in that vicinity. It was also shown by several witnesses that it was the custom for all cars to stop there, take air, and receive and discharge passengers, and one witness testified that the motormen and conductors were changed there. The cars usually stopped on the straight track, but sometimes ran partially in on the "Y." The testimony as to just where they stopped was more or less in conflict. If the jury believed the testimony that it was the custom of the cars to stop at this point so as not to impede traffic across the "Y" track, and this custom was known or communicated to the driver, and he relied upon it in attempting to drive over the track in advance of the car, his negligence was one of fact and not of law.

Was the defendant negligent? The question was in dispute as to whether the car ran into the wagon or the wagon into the car. The plaintiff's testimony showed that the "Y" track was reached by the wagon first, and that it would have passed in safety had not the car ran in a short distance on the "Y" track. This testimony was contradicted by the motorman, who testified that the car reached the "Y" track before the wagon did. The question was clearly one of fact to be considered and determined by the jury, and if they believed plaintiff's version of the affair, they were justified in finding that the car was negligently operated.

We are of the opinion that the trial court disposed of the questions involved in accordance with the rules of law applicable thereto, and the judgment will be affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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KNAPP *v.* HUBBARD.

1. SALES—CONTRACTS—EVIDENCE—RELEVANCY.
   On the trial of an action for wheat sold and delivered, evidence offered by defendant to show where the wheat was stored, how much was shipped out in a single consignment to a milling company, the weight and volume of the car as shipped and as received, the amount of wheat bought from others which was stored in the same bin and shipped in the same car, was admissible to prove that the quantity purchased of plaintiffs was less than they claimed.

2. INTEREST—SALES—PAYMENT.
   Interest is recoverable on a sale of goods not shown to have been bought on credit.

Error to Oceana; Sullivan, J. Submitted April 28, 1913. (Docket No. 109.) Decided July 9, 1913.

Assumpsit by Fred Knapp and another against Edgar R. Hubbard for goods sold and delivered. Judgment for plaintiffs. Defendant brings error. Reversed.

Rufus F. Skeels (Wm. H. Simpson, of counsel), for appellant.

F. E. Wetmore, for appellees.

MOORE, J. This is an action in assumpsit brought by plaintiffs to recover the price of eight loads of wheat which they claim they sold and delivered to defendant at the village of Hart, Mich. The price of the wheat agreed upon was $1.00 per bushel. The most important question in dispute in this case is as to the number of loads of wheat the plaintiffs sold

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and delivered to defendant. The plaintiffs claim that they sold and delivered eight loads, and the defendant claims that they only sold and delivered seven loads; that Exhibits E and F are for the same load, and on account of the weighing of that load twice, once on the big scales and once on the little scales, there were two weighbills made out for the same load and plaintiffs got them and now claim a load for each, making eight loads instead of seven. The dispute is over these two weighbills. There is also a question as to tender and interest; the defendant claiming that a tender was made about June 10, 1912, and kept good by payment in court. And defendant also claims that, it being an open account unliquidated and disputed, there could be no interest allowed. The jury rendered a verdict for the sum of $474.18 over and above the costs of plaintiffs. After the rendition of the verdict plaintiffs' counsel withdrew the sum of $402.68 that had been paid into court, and then the court ordered judgment to be entered in favor of plaintiffs for $71.50, together with costs. The case is brought here by writ of error.

There are many assignments of error, but the most important one relates to the attempt of the defendant to show that all of plaintiffs' wheat, except the last load, was put into a bin along with other wheat, and from there all the wheat in the bin was put into a railroad car, sealed up, and shipped to the People's Milling Company at Muskegon, Mich.; the weight and contents of the other wheat besides that of plaintiffs that was in the car and the names of the persons from whom it was purchased and dates of purchases, and the weight and amount purchased from each person, and the total weight and amount of wheat shipped in the car; that the car was unsealed by the witness, John Dick, at the People's Milling Company at Muskegon, Mich., and the car was unloaded by him,

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all the wheat weighed by him, and the weight tallied with the wheat as entered in the book of the wheat that was in the bin purchased of the various persons named in the book, including all the wheat purchased from plaintiffs, except this last load; that, if there had been the load claimed by plaintiffs as represented by their Exhibit E, there would have been a shortage of 3,570 pounds at Muskegon from what was shipped at Hart.

The question involved was a question of fact. How much wheat was delivered? The testimony was very conflicting. The proof offered, though not conclusive, perhaps had value and should have been allowed to be given to the jury for what it was worth.

There is nothing in the record to indicate that the wheat was sold on credit, but on the contrary it may be assumed it was a sale for cash, and, if not paid for, interest should be allowed. The other assignments of error are unimportant.

Judgment is reversed, and a new trial ordered.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

BERSTON *v.* CITY OF FLINT.

1. DRAINS—MUNICIPAL CORPORATIONS—FLINT CHARTER—SEWER—TRUNK LINE INTERCEPTING SEWER.

   Within the meaning of the charter of the city of Flint, as amended, a storm drain, including a district of some 200 acres, in which from a fifth to a sixth of the population of the city lived, and which was constructed deep

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enough to connect with lateral sewers and branches in the district, intended by the municipal authorities to form part of a system and provide an outlet for surface water which tended to accumulate in the area drained, was a "trunk line intercepting sewer," defined in the charter as a sewer of which the principal object should be the general benefit of the health of the city, or which should be constructed to relieve the river of sewage, etc.

2. MUNICIPAL CORPORATIONS—DRAINS.

Under provisions of the city charter of Flint granting to the common council the power to determine what part of the expense of constructing trunk line sewers should be borne by the municipality, and limiting the amount to such part as primarily benefits the health of the entire city, a determination that the city should pay for 25 per cent. of the cost of a storm drain or sewer, in the absence of evidence of fraud or good faith, was conclusive.

3. TAXATION—SPECIAL ASSESSMENTS—RIGHT OF WAY—CORPORATIONS—COMPROMISE.

In preparing to construct a sewer and to levy a special assessment to pay for the same, the common council of the city of Flint acted without legal authority, where, instead of proceeding in the regular way to obtain a right of way for the sewer, the city made a special arrangement with one of the manufacturing corporations within the district to allow a stated sum for the right of way through its lands and to limit the assessment of the corporation to $500, thereby paying more than the easement was worth and adding to the burden of the others assessed.

Appeal from Genesee; Smith, J., presiding. Submitted April 28, 1913. (Docket No. 46.) Decided July 9, 1913.

Bill by Neil J. Berston and another against the city of Flint for an injunction. From a decree for complainants, defendant appeals. Affirmed.

Black & Roberts, for complainants.

Homer J. McBride, for defendant.

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BROOKE, J. Complainants seek in this action to enjoin the defendant city from confirming an assessment roll, and from entering into a contract for the construction of a certain sewer. The sewer in question is known as "Parkland stormwater sewer." It commences at the intersection of Leith street and Industrial avenue, running thence easterly to State street, thence on State street to Flint river. As designed, it is 3,185 feet long, 54 inches in diameter, and the estimated cost thereof is $25,386. At the present westerly terminus of the proposed sewer, at the intersection of Leith street and Industrial avenue, the ground is much lower than it is north and west of that point, in which directions complainants' property is situated. There seems to have been a natural waterway running from Industrial avenue in an easterly direction to the river, which in recent years has been obstructed by improvements made by the General Motors Company or by its predecessor in title. This natural way having been filled with earth, the General Motors Company placed a 30-inch sewer under Industrial avenue and across its property to take care of the surface water from the north and west which had formerly reached the river through the natural way. In times of heavy precipitation this 30-inch sewer was found to be inadequate, and a considerable area in the vicinity of Leith and Industrial avenues was flooded. The immediate purpose of the contemplated work is to take care of the surface water accumulating at this point. The ultimate purpose of the city, as disclosed by its consulting engineer, is to extend this sewer by building branches north and south on Industrial avenue and thence west, thus making of the section now contemplated a main or trunk line sewer into which would be delivered the surface waters collected in the branches and laterals ultimately to be constructed

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when the plan is fully carried out. The area to be thus served is about 200 acres in extent.

The defendant, assuming to act under its charter powers, determined that 25 per cent. of the cost of construction should be borne by the city at large and 75 per cent. by those owning property in a duly defined special assessment district. The sewer is designed as a stormwater sewer only; the purpose of the city being to construct a separate drainage system for sanitary sewage.

Section 1 of Act No. 554 of the Local Acts of 1907, being amendatory of "An act to incorporate the city of Flint," provides:

"The common council shall have power to cause the expense of making, paving, grading and opening of streets, lanes, alleys, sidewalks, parks, public grounds, sewers and other local improvements to be assessed in whole or in part against the owners or occupants of property to be especially benefited thereby, or by general tax in whole or in part, as it shall deem just and proper: *Provided,* that hereafter, when any trunk line intercepting sewer or sewers shall be constructed, the cost and expense of such part thereof as shall be designed primarily for the benefit of the health of the whole city, shall be assessed against the city at large; trunk line intercepting sewers shall be taken and understood to mean any sewer or sewers, the principal object and purpose of which shall be a general benefit to the health of the city, or which shall be constructed primarily for the purpose of protecting and preserving the salubrity of the waters of the Flint river, and particularly any sewer or sewers which shall parallel the river for the purpose of receiving the sewage of other sewers theretofore or thereafter constructed which would otherwise be emptied into and pollute the water of said river."

Section 2 (Act No. 346, Local Acts 1901, chap. 20) provides:

"Whenever the common council shall determine that the whole or any part of the expenses of any

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public improvement shall be defrayed by an assessment against the owners or occupants of houses or lands to be especially benefited thereby, they shall ascertain as they may think proper the estimated or actual expense of such improvement made or to be made, and shall declare by resolution, to be entered in their records, whether the whole, or what portion thereof, shall be assessed against such owners or occupants, specifying the sum to be assessed and the portion of the city which they deem will be specially benefited by such improvement; and the costs and expenses of making the plans, estimates and assessments incidental thereto shall be included in the estimated expenses of such improvement."

The opinion of the learned circuit judge was, in part, as follows:

"I take up first the question of necessity. As the situation now exists I find there is a necessity for additional stormwater facilities in that part of the city. The public health demands it. A witness gave the number of employees that work in the various factories in that part of the city at 5,000. He was not accurate. Counsel stated in open court the number to be from 5,000 to 8,000. All this great number of employees work in the factories located in that part of the city. It is one-fifth or one-sixth of the entire population of the city of Flint. Some of them live in the district involved in the proposed system of sewers. Many of them are living, scattered about at night in all parts of the city. It is in my opinion such a large and important part of the city of Flint that it may be fairly and accurately said to be for the general benefit of the health of the whole city. The next question considered is this: Is it a trunk line intercepting sewer within the meaning of section 1 of Act No. 554, Local Acts of 1907? I quote the definition given by Prof. Hoad of Ann Arbor, the principal witness on behalf of the city:

"'*Q.* Now, what would be a trunk line sewer, Professor?

"'*A.* A "trunk line sewer," the term is a little indefinite, but engineers understand it is a main sewer which furnishes a common outlet for a number of district mains.

"'*Q.* What would you say about an "intercepting sewer;" is that a technical term?

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"'A. Yes, sir.

"'Q. What is that, Professor?

"'A. An "intercepting sewer" would be one that has a more definite meaning. It is one that traverses a water front at an elevation somewhat lower than the outlets of numerous sewers coming down and discharging water, and which intercepts the flow of sewage from these various sewers and carried it clear down perhaps below the city, at least to some lower point.

"'Q. That is the civil engineer's definition of it, is it?

"'A. Yes, sir.'

"I believe it to be a trunk line intercepting sewer within the meaning of this act, and that the injunction must issue as asked because it is a charge under this statute against the city at large. I also believe the extension westerly of this particular portion involved in this case, if the system is extended, will be a trunk line intercepting sewer also. It will receive the water from a considerable number of lateral district sewers."

We find no difficulty in agreeing with him that the sewer in question, so far as presently designed, is a "trunk line intercepting sewer" within the meaning of the act. We are also of opinion that it may fairly be said that the sewer is (in some measure, perhaps largely) for the general benefit of the health of the whole city. But from these facts it does not in our opinion necessarily follow that the city is precluded from assessing any portion of the cost of the improvement upon a district specially benefited thereby. The language of the charter is peculiar.

The entire cost and expense of constructing sewers of this class is not to be borne absolutely by the city, but only the cost "of such part thereof as shall be designed primarily for the benefit of the health of the whole city." That the common council is vested with a discretion to determine what part thereof is so designed we think is clear. It has exercised that discretion in this instance, and its action (in the absence of fraud or bad faith) cannot be reviewed. *Putnam* v. *City of Grand Rapids*, 58 Mich. 416 (25 N. W. 330).

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And in determining the district benefited by the public improvement and making the assessment thereon it will be presumed to have acted in good faith where mistake or abuse of discretion is not manifest or demonstrable. *Powers* v. *City of Grand Rapids*, 98 Mich. 393 (57 N. W. 250). See, also, *Davies* v. *City of Saginaw*, 87 Mich. 439 (49 N. W. 667); *Roberts* v. *City of Sandusky*, 158 Mich. 521 (123 N. W. 39).

The next question requiring attention is that growing out of the dealings of defendant with the General Motors Company with reference to the sewer in question. It appears that a committee of the common council negotiated with the general manager of said company for a right of way across its lands on the line of Leith street, extended. On July 16, 1912, they reported an arrangement by the terms of which the General Motors Company was to contribute $500 to the cost of construction, and give a deed to the city of a 10-foot right of way, in consideration of which the company was to be exempted from paying any tax to be levied for said construction. On the same day the common council by resolution adopted the report and instructed its sewer committee to secure the deed for the right of way and the $500 from the General Motors Company. On August 5, 1912, a resolution was adopted providing for the construction of the sewer at an estimated cost of $23,356, providing for the creation of a special assessment district and the appointment of commissioners to make the assessment which was fixed at 75 per cent. for the district and 25 per cent. upon the city at large. The mayor and city clerk were likewise by resolution authorized to enter into the contract for the construction with one William Finlay. On August 17th a resolution was adopted rescinding the action taken on August 5th, and on August 19th a new resolution was passed in effect the same as that of August 5th, except that

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the estimated cost, "including the right of way across the lands of the General Motors Company, was fixed at $25,386. We gather from the record that a new arrangement had been made with the General Motors Company by the terms of which it was to be paid the sum of $2,000 for the right of way, and a portion of its real estate was included in the special assessment district.

While the special assessment district is not shown upon any map returned with the record, the evidence shows that no portion of the holdings of the General Motors Company lying south of Leith street extended and contiguous to the proposed sewer was included. Upon this subject the learned circuit judge said:

"I take up next the alleged agreement with the General Motors Company. Although not necessary to consider this branch of the case in order to dispose of it, I think it wise to do so because if, as I suppose, the case finds its way to the appellate court, it will be wise to settle this point also. So, for the purpose of this record, I hold that the agreement not to collect but $500 from the General Motors Company plus a right of way existed originally; that later $2,000 or more was added to the estimated cost of the sewer and $2,000 or more was technically allowed for the right of way crossing the company's ground opened apparently as part of Leith street. I find the right of way is not in fact worth $2,000, but only a nominal sum when the sewer is completed; that the General Motors Company does in fact receive a benefit because it will relieve the surface water accumulating at times at the 30-inch sewer; in fact, if I understand the proofs, it is proposed to connect the 30-inch sewer with the 54-inch one. It amounts to a subterfuge by which the city shall carry out its former agreement to charge the company but $500. It would appear the General Motors Company refused to pay more than the $500 plus the right of way. Now, it may be true that the Buick and the General Motors Company, its successor and its plants, have so benefited the city of Flint that it can well and profitably be exempted from its share

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of the cost of this improvement. I express no opinion upon that. But, when its legal share is transferred to these complainants and to the other persons assessed, it renders the assessment roll illegal. The injunction would also be granted for this reason, if necessary."

The amended special assessment district contained some portion of the lands of the General Motors Company upon which the commissioners appointed by the council assessed the sum of $3,600. This sum will apparently be decreased by $2,000, the amount allowed for the right of way, in the second resolution, although the record does not disclose any contract between the defendant and the company excepting the one exempting it from taxation in consideration of the right of way and $500. Defendant undoubtedly has power to purchase and hold real estate for its proper municipal needs. This power is not only implied or inherent, but is specifically granted in its charter (section 2, chap. 1, Act No. 346, Local Acts 1901). We are, however, disposed to agree with the conclusion of the learned circuit judge that defendant's acts in the premises are open to grave criticism. It is clear that the situation which compels the construction of this large sewer for stormwater only was created in part (perhaps very largely) by the act of the General Motors Company or its predecessor in title in filling in the natural waterway and failing to provide an adequate sewer under its property to take the place of the interrupted ancient watercourse.

The circuit judge found, though upon meager testimony, that the value of the proposed right of way is much less than the $2,000 proposed to be paid therefor. With such light as the record affords we are disposed to agree with him. The defendant should proceed in a proper and legal manner to acquire the right of way at its true value, and all lands of the General Motors Company which will be especially benefited

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by the improvement should be included in the special assessment district and made to bear a proportional share of the burden. While no fraud is shown on the part of the council in determining that the private owners of property in the special assessment district should bear 75 per cent. of the cost, it is significant that the commissioners appointed by that body to make the assessment recommended that 50 per cent. only be so apportioned, the balance to be paid out of the general fund. Acting in good faith and without fraud, the final determination of the common council upon this question is controlling upon complainants, and may not be reviewed.

The decree is affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

LANNING v. STILES.

1. INTERPLEADER—EQUITY—CONTRACTS.
   The remedy of interpleader is available only if defendants claim the same debt or thing, and if all adverse claims depend on or were derived from a common source, and if the complainant has no interest in or claim upon the subject-matter, and complainant must have incurred no independent liability to any of the claimants.

2. SAME—BROKERS—COMMISSIONS.
   Brokers claiming commissions under separate contracts, executed on different dates, covering the same property but different amounts of land, and possibly providing for different commissions, cannot be compelled to interplead

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although complainant admits that she owes either one or the other defendant compensation: the contracts were distinct and the claims depend on different sources; complainant also may have incurred an independent liability to both brokers.

Appeal from Van Buren; Des Voignes, J. Submitted April 21, 1913. (Docket No. 96.) Decided July 9, 1913.

Bill by Nettie Lanning against A. E. Stiles and Albert A. Abbott for a decree of interpleader. From a decree for complainant, defendant Stiles appeals. Reversed.

Thomas J. Cavanaugh, for complainant.

David Anderson, for defendants.

The bill of complaint was filed in this cause for the purpose of enjoining the prosecution of a suit at law, brought by defendant Stiles against complainant, and for the further purpose of compelling the two defendants to interplead and determine which of them was entitled to a real estate commission of $140, which complainant admits she owes to one or other of said defendants, and which she has paid into court. To this bill defendant Stiles demurred, and, the demurrer being overruled, he then answered, denying complainant's right to enjoin him from proceeding with his suit at law and to compel him to interplead with defendant Abbott. From a decree of interpleader, defendant Stiles appeals.

BROOKE, J. *(after stating the facts)*. The record in this case shows that complainant made two separate and distinct contracts, one with each of the defendants. They were different in date, different in the number of acres to be sold, and perhaps different

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as to the commission to be paid. The primary question involved, therefore, is not which of the defendants is entitled to a specific "fund" (the commission), but whether defendant Stiles can be enjoined from prosecuting a suit at law upon his individual contract, claiming to have performed the same.

To entitle a complainant to file a bill of interpleader the following essential facts must appear: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all adverse claims or titles must be dependent or derived from a common source; (3) the complainant must not have nor claim any interest in the subject-matter; (4) complainant must have incurred no independent liability to either of the claimants. 1 Pomeroy's Equitable Remedies, § 43 *et seq.;* 23 Cyc. pp. 7, 11, and cases cited in notes.

We are of opinion that complainant has not in her bill averred, or by her proofs established, facts sufficient to entitle her to the remedy sought. The defendants are not claiming the same "thing, debt, or duty." Defendant Stiles is claiming compensation for services alleged to have been performed under his individual contract, and Abbott is demanding compensation under a separate contract, the terms of which were unknown to Stiles and with which Stiles had nothing to do. The conflicting claims of the two defendants are obviously not dependent upon each other, or derived from a common source. The claim of each is based upon his own contract and is wholly independent of that of his codefendant. Complainant has, or may have, incurred an independent liability to both defendants. She testifies that she made a contract with each, and if each has fulfilled the terms thereof, each is entitled to a right of action thereunder. The principle involved has been discussed in several Michigan cases. *Michigan & Ohio Plaster Co.*

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v. *White*, 44 Mich. 25 (5 N. W. 1086); *Moore* v. *Barnheisel*, 45 Mich. 500 (8 N. W. 531); *Wallace* v. *Sortor*, 52 Mich. 159 (17 N. W. 794); *Vogle* v. *Insurance Co.*, 147 Mich. 333 (110 N. W. 1067); *Detroit Trust Co.* v. *Hunrath*, 168 Mich. 180 (131 N. W. 147).

The decree is reversed, and the bill of complaint dismissed, with costs of both courts.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

SPENCER *v.* JOHNSON.

1. INTOXICATING LIQUORS—EVIDENCE—DAMAGES—PAIN AND SUFFERING.

Evidence of pain and suffering experienced by plaintiff's husband was inadmissible for the purpose of showing his condition and inability to work, in an action brought by the wife against certain liquor dealers for unlawful sales resulting in injury and disability to such husband.

2. SAME—SUPPORT—EVIDENCE

And it was erroneous to admit evidence that he had sold his cow, horse, and farm to support his family during his disability.

3. SAME.

Testimony that he had borrowed money for their support was competent, but its effect should be limited to the question of the length of time during which lack of support might be expected to continue.

4. SAME—HUSBAND AND WIFE—SERVICES OF MARRIED WOMAN.

It was proper, also, to admit evidence of the value of the wife's services in nursing him during his illness.

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5. SAME—INDEBTEDNESS.
Indebtedness of plaintiff's husband for borrowed money and medical attention should be taken into consideration only for the purpose of determining the length of the period during which plaintiff would probably be deprived of her customary support.

6. SAME—FUTURE DAMAGES—EVIDENCE.
Although the mortality tables were not introduced in evidence, there was no error in leaving to the jury the question of plaintiff's future damages, the husband's injuries not being permanent; the testimony as to his age, physical condition, habits, etc., and plaintiff's age and appearance, constituted a sufficient basis for the finding.

7. SAME—DAMAGES—EXEMPLARY DAMAGES.
Nor did the court err in reading to the jury the statute on which plaintiff's action was based, where he did not leave the question of exemplary damages to the jury in his charge.

8. TRIAL—ARGUMENT—ABSENCE OF COURT.
While it may not constitute reversible error for the trial judge to absent himself from the bench during argument of counsel, the practice is not commendable.

Error to Montcalm; Davis, J. Submitted April 10, 1913. (Docket No. 27.) Decided July 9, 1913.

Case by Myrtle Spencer against Peter Johnson and others for unlawful sales of intoxicating liquor to plaintiff's husband. Judgment for plaintiff. Defendants bring error. Reversed.

N. O. Griswold, Charles L. Rarden, and *A. F. Bunting,* for appellants.

R. A. Hawley, for appellee.

BROOKE, J. This is an action for damages brought by the wife of an alleged habitual drunkard against four saloon keepers and the surety upon their several bonds.

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As a result of the alleged illegal sales, John M. Spencer, the husband, became intoxicated, and while in that condition attempted to board a moving train in the city of Greenville, Montcalm county. Through some misadventure, not clearly shown in the record, he was drawn under or partially under the train, and suffered physical injuries of a more or less serious character, including a very severe scalp wound and a possible fracture of the skull. As a result Spencer was confined in a hospital for 39 days, and it is claimed that his physical ability to labor and earn money for the support of the plaintiff has become seriously impaired, though there is no evidence that such impairment is permanent in character. The record shows, however, that from the date of the accident to the date of the trial, a period of more than one year, Spencer was unable to perform any hard labor, but was forced to confine himself to the performance of chores and work of a light or occasional character. He had been, according to his own testimony, a heavy drinker of intoxicating liquors for more than 15 years, getting drunk as often as once a week usually, and always as often as opportunity afforded and he had money with which to purchase liquor to gratify his appetite. He testified that on the day of his injury, March 9, 1910, he purchased from each of the defendant saloon keepers one or more drinks of whisky. Each defendant by himself or his bartender denied that any intoxicating liquor was sold to Spencer on the day in question. The jury, however, to whom this question was fairly submitted, brought in a verdict against all defendants in the sum of $2,550.

Many errors are assigned by defendants, which may be grouped under two heads: (1) In the admission of certain testimony; (2) in erroneously charging the jury.

The court permitted Spencer, over objection, to

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give evidence at length of the pain and suffering he had endured as a result of the injury. In the charge the court attempted to limit the effect of this testimony by the following instruction:

"Some testimony has been received here in regard to the pain he has suffered, the suffering he has experienced. She is not to be remunerated for that, but it was received for the purpose of bearing upon his earning ability or power to work and bearing upon his condition. What has been his condition since the injury? What is his condition now? What is the probability about its continuing? So that his condition, suffering, pain, and weakness has been laid before you for the purpose of aiding you in determining the extent of his injury, the extent to which she has been deprived of her support, the extent to which she has suffered any loss of property that would otherwise belong to her and be retained by her had it not been for the sacrifice she would have to make owing to this injury received by her husband."

We are satisfied that the admission of this testimony was prejudicial error. The question of Spencer's physical condition after the injury as bearing upon his ability to perform labor was one entirely proper for inquiry, but it could, and should, have been ascertained without a history of his pain and suffering which afforded no basis for plaintiff's recovery, and which could scarcely fail to influence the verdict of the jury.

Evidence was admitted that Spencer, after the injury, had sold his cow, horse, and his equity in a 10-acre farm, had borrowed several hundred dollars, and had used this money, together with the avails of his sales, toward the support of his family, including plaintiff. Evidence also was admitted that the doctor's bill, amounting to $484, was unpaid. It is strenuously urged upon the part of defendants that all this testimony was inadmissible. We think the testimony relative to the sale of his property was

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erroneously admitted. We cannot say that evidence relative to his indebtedness had no legitimate bearing upon the issue, but its effect upon the deliberations of the jury should have been carefully guarded. Plaintiff has a right in this action to recover damages for injury to her "person or property or means of support or otherwise." She gave testimony tending to show that prior to Spencer's injury she had been accustomed to receive support from him of the annual value of $200, which since the injury had been withdrawn. This evidence (if believed) afforded a legal basis to the jury for the computation of their verdict; the only other element necessary being the length of time during which such failure to support would continue. While the plaintiff was not entitled to recover any of the sums of money represented by her husband's debts as a substantive part of her verdict, the fact that he was indebted at the time of the trial as a result of his injury was pertinent as bearing upon the length of time during which the alleged accustomed support would probably be withdrawn from plaintiff.

Evidence was admitted of the value of plaintiff's services in assisting to nurse Spencer while he was in the hospital. This testimony was admissible under the authority of *Thomas* v. *Dansby*, 74 Mich. 398 (41 N. W. 1088). Upon the question of the measure of damages the court charged:

"*Sixth.* In arriving at your verdict as to the amount of plaintiff's damages, in case you find she is entitled to recover, it is your duty to take into consideration the amount of money which the said Spencer is shown to have been able to earn prior to March 9, 1910, and the amount of money which he is shown to have contributed prior to that date for the support and maintenance of said plaintiff, and the amount which he has been able to contribute since that time for her support and maintenance; also the

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amount of the charges of the physician for his services in the care and treatment of said Spencer and the expense of nursing said Spencer, including the extra services required of said plaintiff in caring for and nursing him at the hospital, also the hospital bill and charges for supplies in his treatment; also the property that has been sold and the proceeds thereof used in the support of the plaintiff and family since that injury and the amounts of money borrowed by said plaintiff and said Spencer, and which is still owing and unpaid, not as fixing absolutely the amount which she has already been damaged, but as bearing upon the question as to the amount that she has been injured in her property and in her support up to the present time. Also you have the right, and it is your duty, to ascertain and determine how much damage she will suffer in the future by reason of injury to her property and means of support by reason of any effects of said injury to said Spencer that you may find was occasioned by his said intoxication and for such time in the future as you may determine that he will suffer from and be disabled by such injury."

That portion of the foregoing excerpt beginning with the words "also the amount," etc., and ending with "up to the present time" is in our opinion subject to just criticism. The value of plaintiff's services in nursing her husband was a proper element to be considered by the jury.

As the evidence of the sale of his property by Spencer and the use of the money thus obtained to support his family was improperly admitted, it follows that the jury should not have been permitted to consider those facts. And consideration of the fact that he was indebted to the doctor and for borrowed money should have been permitted only so far as it bore upon the length of time plaintiff would probably be deprived of her support.

Defendants urge that the last paragraph of the instruction quoted *supra* is erroneous because of the

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fact that the mortality tables were not introduced, and therefore there was no evidence in the case from which the jury could determine the amount of future damages. The mortality tables are not conclusive evidence upon the question of the duration of life. Without them the jury still have other facts in the case. They have the age both of the plaintiff and her husband. They have a history of the husband's physical condition and habits, and they have the benefit of an actual observation of both the plaintiff and her husband. Upon these facts and this observation the jury may base their finding. 4 Elliott on Railroads, § 1813, and cases cited.

It is urged that the court erroneously submitted the question of exemplary damages to the jury. It is true that in delivering his charge the court read the statute which provides for the recovery of such damages. When instructing the jury upon the measure of damages, however, no mention was made of "exemplary" damages. It is, we think, clear that such damages were not allowed by the jury.

Much argument is devoted by counsel for defendants to the question of alleged improper comment to the jury on the part of plaintiff's counsel in his closing argument. It appears that the argument was made in the absence of the court and stenographer, and therefore no ruling or exception thereon is included in the record. Of course, we can pay no attention to the point except again to emphasize what we have so frequently reiterated—that counsel should present their claims to juries fairly and without appeals to passion or prejudice. This record, however, presents a situation which we believe calls for comment. Without determining that it is reversible error for the presiding judge to absent himself from the bench during argument of counsel, we have no hesi-

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tation in saying that the propriety of such a course is questioned, and its practice not to be commended.

The judgment is reversed, and a new trial ordered.

MOORE, MCALVAY, STONE, and OSTRANDER, JJ., concurred with BROOKE, J. STEERE, C. J., and KUHN and BIRD, JJ., concurred in the result.

WHEELER v. COLEMAN.

ELECTIONS—QUO WARRANTO—CANVASS—RECOUNT—OPENING BOX.

In quo warranto proceedings, evidence that the board of election inspectors announced the result of the count to be favorable to relator but did not prepare a statement of the result, and, on the following day, at the request of respondent, who did not file a petition and pay a fee as required by law, caused the box to be opened and the ballots recounted, relator being absent, that as a result of the new proceedings respondent was declared elected to the office, *held*, insufficient to support respondent's title to the office of township treasurer because of the neglect to observe statutory requirements for recounting the ballots; and although relator was notified and appeared at the second recount, which was commenced later in the day, his presence without protest was not conclusive against him. 1 Comp. Laws, §§ 3638-3648 (1 How. Stat. [2d Ed.] §§ 238-248).

Error to Van Buren; Des Voignes, J. Submitted April 22, 1913. (Docket No. 110.) Decided July 9, 1913.

Quo warranto by Oscar Wheeler against Arthur

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Coleman to determine title to the office of township treasurer. Judgment for relator. Respondent brings error. Affirmed.

W. J. Barnard, for appellant.

Glenn E. Warner and *Thomas J. Cavanaugh,* for appellee.

In this case relator and respondent were rival candidates for the office of treasurer for the township of Antwerp. The election was held April 1, 1912. At the close of the polls on election day the vote was canvassed by the members of the board, and it was publicly announced by the chairman thereof that relator had received 213 votes and respondent 209 votes. At the conclusion of the canvass, and after the announcement of the result, the ballots were returned to the box, the box was locked and sealed, though not in accordance with the statute. 1 Comp. Laws, §§ 3638, 3647 (1 How. Stat. [2d Ed.] §§ 238, 247). During the canvass the unused ballots were passed around among those present to keep tally upon, and were not returned to the township clerk, as provided by 1 Comp. Laws, § 3645 (1 How. Stat. [2d Ed.] § 245). The inspectors of election did not, on the night of election, prepare a statement of the result and certify it in duplicate, as required by 1 Comp. Laws, § 3648 (1 How. Stat. [2d Ed.] § 248), but returned upon the following morning for that purpose, having left the ballot box, locked and in a manner sealed, unguarded in the town hall during the night. On that morning the respondent appeared before the board and asked for a recount. Respondent did not comply with the law (1 Comp. Laws, § 3725, 1 How. Stat. [2d Ed.] § 322) in that his petition was not in writing, he made no deposit, and served no notice upon relator, the opposing candidate. Nevertheless

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the inspectors opened the box in the absence of relator, and proceeded to recount the ballots; respondent and his brother handling and advising upon the same. About 11 o'clock a. m. a member of the board telephoned to relator, who went to the town hall in the afternoon, when the ballots were again recounted. As a result of this recount the board found, announced, and certified that respondent had received 212 votes and relator had received 210. This action of the board purported to give respondent title to the office. Whereupon, and on April 15, 1912, relator filed his petition for leave to file an information in the nature of a quo warranto for the purpose of determining his rights to said office. Upon the trial of the issue the court directed a verdict in favor of relator. Judgment was entered thereon, and relator assumed the office. At the time the case was presented in this court relator had completed his duties, as the term had expired.

BROOKE, J. *(after stating the facts).* It is the contention of respondent: (1) That the court erred in directing a verdict for relator; (2) that the court erred in not directing a verdict for respondent; (3) that the court erred in not admitting in evidence the ballots said to have been cast at the election, and in not submitting the question to the jury. We deem it unnecessary to follow respondent's counsel in his legal argument. The undisputed facts in the case fully warranted the action taken by the court below.

Assuming that the ballot box was properly locked, sealed, and cared for on the night of April 1st, and that it was found by the board on the morning of the 2d in the same condition in which they had left it, the board yet had no legal right to open the box and proceed to a recount of the ballots in the absence of relator and without compliance, on the part of re-

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spondent, with the statutory requirements relative to recounts. The fact that relator appeared in the afternoon and participated in a second recount without protest is not material. *May* v. *Board of Canvassers*, 94 Mich. 505, at page 512 (54 N. W. 377). The box had been opened several hours earlier, and the ballots had been handled by at least one person not a member of the board (respondent's brother); and, while the evidence tends to negative any fraud or wrongdoing on the part of any one engaged in the first recount, we are of opinion that what was done was so clearly illegal and an invasion of relator's rights as to warrant the court in holding that the result as announced by the board upon the night of the 1st was the true result and binding upon all parties. The proceedings for a recount are purely statutory, and the statutory requirements must be observed. *Andrews* v. *Otsego Probate Judge*, 74 Mich. 278 (41 N. W. 923); *Miner* v. *Beurmann*, 165 Mich. 672 (131 N. W. 388). See, also, *Ritze* v. *Board of Canvassers*, 172 Mich. 423 (137 N. W. 964); 15 Cyc. pp. 429, 430.

The judgment is affirmed.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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HARTINGH v. BAY CIRCUIT JUDGE.

1. INJUNCTION—PLEADING—EQUITY—AFFIDAVITS.

   In equity, it is a general rule that an injunction will not issue on a bill verified upon information and belief, unless it is supported by affidavits of persons who have knowledge of the facts: the pleading may be sworn to by complainant if he knows a part of the material facts and states the remainder on information and belief; and it is proper to support the same by affidavits of those who know the matters not positively averred.

2. SAME—ANSWER—DISSOLUTION.

   The equity of the bill was not fully met so as to require the dissolution of an injunction restraining a village council from granting licenses to more retail liquor dealers than the statute authorized, where complainant charged that defendant board of trustees of the village threatened to grant more retail liquor licenses than the law warranted, and set up facts showing the applications made and the purpose of a majority of the trustees to issue the licenses, and where defendant's answer merely negatived any threat to grant the applications as alleged but did not deny the other material averments.

3. INTOXICATING LIQUORS—SALOONS—DEATH OF LICENSEE.

   Under the provisions of the Warner-Cramton act (Act No. 291, Pub. Acts 1909, 2 How. Stat. [2d Ed.] § 5055 *et seq.*), the death of a saloon keeper terminates his license, and it is treated as a surrender, reducing the number of saloons that may be lawfully licensed in a community that had more than one saloon to 500 inhabitants at the time the law went into effect.

4. SAME—LICENSE—VILLAGES—ESTATES OF DECEDENTS.

   The right to carry on the business of selling intoxicating liquors at retail is in the nature of a personal license, and does not pass to the personal representatives of a deceased licensee.

5. SAME—STATUTES—ESTATES OF DECEDENTS.

   The amendment of 1911, Act No. 170 (2 How. Stat. [2d

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Ed.] §§ 5056, 5062 *et seq.)*, does not apply to licensees who died before the act took effect: it recognizes, however, that a license is surrendered on the death of a licensee and adds a period of grace on the filing of a new bond by the administrator. At the end of the year for which the license was granted all rights thereunder end and no authority to apply for a renewal vests in the personal representative.

6. SAME—VOLUNTARY SURRENDER.

The decease of a licensed saloon keeper works a voluntary surrender within the meaning of the statute.

7. SAME—EQUITY—INJUNCTION—PARTIES.

The attorney general is a proper party complainant in equity to prevent the violation of law by village trustees by the unlawful issuance of licenses to retail liquor dealers.

Mandamus by George Hartingh and others, as trustees of the village of Pinconning, against Chester L. Collins, one of the circuit judges for the county of Bay, to compel respondent to vacate a preliminary injunction issued in a suit in which the attorney general is complainant and relators are defendants. Submitted May 1, 1913. (Calendar No. 25,683.) Writ denied July 9, 1913.

Joslyn & Houghton and *W. A. Collins*, for relators.

W. B. Henry and *C. A. Higgs*, for respondent.

STONE, J. In this proceeding relators, who are members of the council of the village of Pinconning, Bay county, pray for a writ of mandamus directing the respondent to vacate an order made by him on April 23, 1913, denying a motion to dissolve a preliminary injunction, and to dissolve said injunction. It appears that on April 14, 1913, the attorney general, on relation of John W. Kinsey, Albert Butler, and John C. Salmon, three residents and property owners of said village, filed an injunction bill in the

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Bay circuit court, in chancery, and on application to respondent a temporary injunction was issued and served on relators. Said bill sets forth that relators were the trustees, president, and clerk of the village; that the last United States census showed the population of said village to be 750; that in April, 1909, there were six licensed saloons in said village; that subsequent to said date, and prior to May 1, 1911, two of said saloon keepers had died during the time their licenses were in force; that by reason thereof the number of saloons legally authorized in said village was reduced from six to four, but that during 1912 six saloons were licensed and did business in said village. The foregoing statements are set forth as positive averments of fact. The remainder of the bill states upon information and belief that the six persons conducting saloons in said village in 1912 have already made, or will make, application to said village for permission to renew their licenses; that said trustees will be asked to approve six applications to conduct saloons in said village, and that said trustees threaten to approve six applications to conduct saloons in said village, and that unless restrained by the court will approve six applications to conduct saloons therein. Complainants allege in their bill that they based their conclusion upon certain statements made by a majority of the members of the village council, and claimed that the proposed action would be a violation of Act No. 291 of the Public Acts of 1909 (2 How. Stat. [2d Ed.] § 5055 *et seq.*). The bill was verified in the usual form by Albert Butler, and there accompanied the bill the affidavits of Albert Butler and three other persons, setting forth statements made to or in the hearing of affiants, by four members of the council, to the effect that the council would accept and approve six applications for liquor licenses in said village.

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The answer of the defendants (relators here) admitted that six persons had made applications for liquor licenses for the year 1913, but denied that trustees and members of said council threatened to approve of six; they denied that complainants had any information upon which to base the statement, made on information and belief, "that unless restrained by order of the court said trustees will approve six applications to conduct liquor business;" they denied that complainants had information upon which to base a statement as to what action would be taken by the village council; denied that the allegations set forth were supported by the affidavits referred to; denied that the allegations in said affidavits or the statements therein made, if true, supported the allegations of the bill, and denied that the approving of six applications and bonds to conduct retail liquor business in said village for 1913 would be a violation of the laws of this State, particularly the so-called "Warner-Cramton Law," and denied that such licenses, if granted, would be illegal, and that the place where the sale of liquor would be had would be a nuisance and work an "irremediable" injury as claimed in the bill. A motion to dissolve the preliminary injunction was thereupon made and denied by the respondent.

Relators say in their brief that the questions involved in this issue are:

(1) May a temporary injunction issue on a petition verified only upon information and belief?
(2) Does the death of a saloon keeper constitute a voluntary surrender of his license pursuant to section 39, Act No. 291, Public Acts of 1909?
(3) There is no equity in the injunction bill.

1. While the bill or information itself states many of the material matters on information and belief, it is supported by affidavits setting forth matters which

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show statements made by a majority of the council relative to the intention of such members to approve the applications and bonds in question. This bill was verified by one of the persons upon whose relation it was filed in accordance with Chancery Rule 2. It was proper practice to support the bill by accompanying affidavits of persons having knowledge of the facts. This court said in *Manistique Lumbering Co.* v. *Lovejoy*, 55 Mich., at page 193 (20 N. W. 900):

"It is a cardinal rule in equity that a preliminary injunction should never be granted without the oath of some one, from his own knowledge, of such facts as will justify it."

We are of opinion that the practice followed in this case satisfies that rule. In *Allen* v. *Wayne Circuit Judge*, 159 Mich. 612 (124 N. W. 581), it was said:

"As the same (the bill) was based upon information and belief, it *alone* would not have justified the allowance of the writ."

This clearly recognizes the practice that the bill may be supported by other proof.

Counsel for relators urge that the answer denied the material allegations of the bill, and for that reason the injunction should have been dissolved. The answer does not fully and frankly deny the material allegations of the bill. It is true it denies that the defendants "threatened" to approve of six applications to conduct retail liquor business in said village, but it nowhere states that they do not intend to do so, but proceeds to state that such course would not be a violation of the statute.

It is well-settled equity practice that if, after the answer comes in, there remains a reasonable doubt as to whether the equity of the bill is sufficiently negatived, the court may continue the injunction to the hearing. In continuing and dissolving injunctions, the relative inconvenience to be suffered by the

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parties may be of controlling weight. For instance, although the answer denies all the equity of the bill, yet the injunction will be continued in case its dissolution might thwart the object of the litigation and render a subsequent victory by the complainant of no avail. 22 Cyc. p. 978, and cases cited; *Attorney General* v. *Oakland County Bank*, Walk. Ch. (Mich.) 90; *Chicago, etc., R. Co.* v. *Kalamazoo Circuit Judge*, 138 Mich. 246 (101 N. W. 525).

2. Upon the main question involved, the learned circuit judge, in an opinion filed denying the motion to dissolve the injunction, has so clearly and fully stated the law of the case that we insert the same here:

"The attorney general, on the 14th day of this month, filed in this court an information asking for a permanent injunction against the village trustees of the township of Pinconning, restraining them from approving the bonds of more than four retail liquor dealers in the village of Pinconning for the year commencing May 1, 1913, and asking a temporary injunction to issue pending the final hearing in the case, or until the further orders of the court. On the 21st day of this month the defendants filed an answer to said information, and made a motion for the dissolution of said temporary injunction. This motion has been fully argued by opposing counsel.

"The Warner-Cramton liquor act took effect in September, 1909. It provided for a reduction in the number of saloons until the number was fixed at one for each 500 inhabitants of the city, township, or village in which the dealer was situated. It fixed as the number from which the reduction should be started the number of retail liquor dealers in business in the designated municipality in April, 1909. In April, 1909, the number of retail liquor dealers in the village of Pinconning was six, and by the census of 1910 the population of the village of Pinconning did not exceed 750. Between May 1, 1909, and May 1, 1910, Mr. Smith, one of the retail liquor dealers in Pinconning, to whom a license was issued, died, and

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between May 1, 1910, and May 1, 1911, Mr. Greenleaf, another of said licensed retail liquor dealers, died.

"By the act of 1911 amending the Warner-Cramton law these two elements were incorporated into the liquor law; *first*, the approving council or board of trustees or township board was authorized without assigning any cause, to reject any offered bond; *second*, in case of the death of a licensee his administrator or executor was personally, as such, permitted to carry on the business for the remainder of the licensee's year; no other privilege as to time or succession, however, being granted. In April, 1910, the trustees of Pinconning approved six liquor bonds for the ensuing year, and in April or May, 1911, the same board approved six liquor bonds for the year commencing May 1st, and in April or May of 1912, the same council approved six liquor bonds. * * *

"It clearly appears, from the information and answer, as matter of fact, that a majority of the members of the board of trustees of the village of Pinconning firmly believe that they have the legal right under the existing conditions to approve six retail liquor bonds, that notwithstanding the facts in this opinion enumerated, the trustees have for three years, since the Warner-Cramton act took effect, approved that number of such bonds each year, and that unless restrained by the temporary injunction of this court, they will approve all six retail liquor dealers' bonds for the year commencing May 1, 1913. This situation presents for the consideration and decision of this court the question as to whether or not by reason of the death of Mr. Smith and Mr. Greenleaf the number of bonds which the village trustees may approve is reduced from six to four.

"Under the Warner-Cramton act a license issued to a retail liquor dealer is not property, and does not confer any property right; it is not assignable, and prior to the act of 1911 did not confer any right or privilege to an executor or administrator of a deceased licensee; such license in law is a mere permit, protecting its holder against legal attack for acts which, without the sanction of the license, would be illegal and punishable. 23 Cyc. pp. 110, 111, 155; *People* v. *Schafran*, 168 Mich. 324, 334 [134 N. W.

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29]. Under these authorities the death of Mr. Smith terminated his license, and the death of Mr. Greenleaf terminated his license.

"It is the settled law of this State that the primary object of the Warner-Cramton act is to work a gradual reduction of saloons until that number shall not exceed one to each 500 inhabitants of the municipality in which the saloons are situate. *Rhode* v. *Wayne Circuit Judge*, 168 Mich. 683 [131 N. W. 523, 135 N. W. 457]; *Ploof* v. *Bangor Township*, 168 Mich. 697 [134 N. W. 3, 135 N. W. 273].

"It is also a well-settled principle of statutory construction in this State that where a given act, or series of acts, show a primary object to be carried out thereby, the general intention of the legislature will be carried out, regardless of the circumstances that the correct rules of grammatical construction of the act, and the recognized general rules of statutory construction as applied to the act, and the standard rules of definition of words in the act might singly or together lead to a different conclusion. This principle is illustrated by the case of *Drake* v. *Industrial Works*, 174 Mich. 622 (140 N. W. 933), and *Ploof* v. *Bangor Township*.

"Considering that the death of Mr. Smith and of Mr. Greenleaf *terminated and canceled two licenses*, and left no power or authority in any one to apply for a license in place of either, the quoted rules would seem to force the conclusion that not more than four bonds could be approved in Pinconning for the year commencing May 1, 1913. But this question is most conclusively determined by the decision in *Ploof* v. *Bangor Township*, and the statements of the court in that case herein-below quoted. The facts in issue in that case, and the question of statutory construction involved therein, and the decision reached and language below quoted, settle the question in this case, and require a decision of this court sustaining the temporary injunction. The court says (168 Mich. page 699 [134 N. W. 4]):

"'It is urged that a license can only be surrendered by the holder thereof discontinuing the sale of liquor at retail thereunder while it is still in force, and that the mere failure of the holder (or another) to apply for a renewal thereof at the

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expiration of the term does not amount to a "voluntary surrender." We are unable to agree with this contention. A careful reading of the whole act (No. 291, Pub. Acts 1909), and particularly section 39 thereof, convinces us that the primary object of the legislature was to work a gradual reduction in the number of saloons until that number should not exceed one to each 500 inhabitants. * * * We have no hesitation in holding that where a license expires by *limitation*, and neither the holder thereof nor any other duly qualified persons make application therefor before the beginning of the ensuing license year, that license must be held to have been voluntarily surrendered within the meaning of the act, and it cannot thereafter be renewed until, under the provisions of the law, the population of the municipality has grown sufficiently to warrant its issuance.'

"On the rehearing (168 Mich. page 701 [135 N. W. 273]):

"'Under the situation actually presented, we must decide whether a new applicant is entitled to take the place of the holder of a license, when the old holder declines, for any reason, to ask for a renewal thereof, where the ratio of saloons to population is greater than one to 500. * * * We are of the opinion that the total number of licenses to be granted must be held to have been diminished by one on account of the failure of an old holder to apply for a renewal; that as to that license it must be held to have been voluntarily surrendered, within the meaning of the act. We are led to this conclusion by a consideration of the evident purpose of the legislature, as evidenced by the whole act, which was to gradually work a reduction of the number of saloons until they reached the ratio fixed by the statute, and to effect this end without undue hardship to those already engaged in the business. It is, we think, clear that, but for this latter consideration, the legislature would have at once fixed the number of licenses to be granted at the statutory ratio.

"'These conclusions do not necessarily mean that the legislature sought to, or did in fact, create a property right in the holder of a license to a renewal thereof. It means only that, so long as the holder of a license is able to meet the requirements of the licensing body, and move it to exercise its discretionary power of selection in his behalf, he shall be permitted to remain in the business, even though by so doing the number of saloons continues to be higher than the ratio fixed

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by the statute. When he fails to apply for a renewal, then the number to be granted is reduced by one, if the number in force is greater than the statutory ratio. Any other construction would clearly prevent any *sensible* reduction in the number of saloons, to effect which was, as we have seen, the cardinal object of the legislation.'

"It follows from what has been said that the motion to dissolve the temporary injunction must be denied."

That the death of a saloonkeeper constitutes a surrender of his license within the meaning of the Warner-Cramton act is in our opinion the proper construction of that act.

In the absence of legislation to the contrary, upon the death of the licensee, the privileges conferred by the license do not pass to or vest in his personal representatives, nor are they authorized to continue the business at retail. The right to carry on the business is in the nature of a personal license to the party who complies with the statute, and it cannot be said to pass over to the administrator at the death of the party holding it. 23 Cyc. p. 155; *People* v. *Sykes*, 96 Mich. 452-454 (56 N. W. 12); *Fuchs* v. *Grass Lake Common Council*, 166 Mich. 569 (132 N. W. 96).

By the provisions of Act No. 170, Public Acts of 1911 (2 How. Stat. [2d Ed.] § 5094) (which, however, does not apply to this case because it did not take effect until after the two deaths here involved), the administrator of a deceased licensee was "privileged to continue in the business under the license of the deceased licensee for the remainder of the year, upon filing a new bond." In our opinion this amendment establishes two things: *First*, it recognizes that prior to its adoption a license was surrendered by the death of a licensee; *second*, it adds a period of grace to the life of the license, upon certain conditions. At the end of the year for which the license was granted, however, the license expires, and no authority is vested in the administrator to apply for

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a renewal of the license. There being no one in a position to apply for and receive a renewal of the license as a representative of the deceased licensee, that license must therefore be considered as surrendered, or given up.

Under the statute then in force (act of 1909), the death of Mr. Smith and Mr. Greenleaf terminated their licenses. These were not involuntary surrenders in the sense that the licenses were taken away upon convictions of violations of the liquor law, but were voluntary surrenders within the meaning of the Warner-Cramton act, in that the licensees failed to apply for and were unable to accept renewals.

What is the meaning of the phrase "voluntary surrender" as used in this act? Does it mean that the holder of a license must voluntarily come forward and by an expression of his will let the licensing authorities know that he no longer intends to act under the license? Or does it mean that, unless the licensee does actually come forward, and is in a position to claim and hold a license for the ensuing year, he will be considered, in the eye of the law, to have voluntarily surrendered his license? A reference to Webster's and the Century Dictionary shows that the word "voluntary" means "produced in or by an act of choice," and it also means "acting of itself," or "spontaneous." Taking into consideration the object of the act, as heretofore construed by us, it should be held that the surrenders here involved, occurred "acting of themselves," or "spontaneously," when certain conditions existed, or certain events occurred, or failed to occur. This construction is not only consistent with the language of the act, but is in accord with the purpose of the act.

3. That the attorney general is a proper party to proceedings to prevent the violation of a law, by public officers, and to institute proceedings of this nature,

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see *Attorney General* v. *City of Detroit*, 26 Mich. 263; *Attorney General* v. *City of Detroit*, 71 Mich. 92 (38 N. W. 714); *Attorney General* v. *Board of Auditors of Wayne County*, 73 Mich. 53 (40 N. W. 852); *McMullen* v. *Ingham Circuit Judge*, 102 Mich. 608 (61 N. W. 260); *Village of Wolverine* v. *Cheboygan Circuit Judge*, 162 Mich. 713 (127 N. W. 744).

We think that the bill stated a case for equitable relief. We find no occasion to interfere with the action of the circuit judge, and the writ of mandamus is denied, with costs to respondent.

STEERE, C. J., and MOORE, MCALVAY BROOKE, KUHN, and OSTRANDER, JJ., concurred with STONE, J. BIRD, J., concurred in the result.

PRINE *v.* SINGER SEWING MACHINE CO.

1. FORGERY—FRAUD—MALICIOUS PROSECUTION.
   In the offenses of forgery or uttering forged instruments, a fraudulent intent is the gist of the crime.

2. MALICIOUS PROSECUTION—FORGERY—PROBABLE CAUSE.
   Testimony that plaintiff, in an action for malicious prosecution, took orders for sewing machines as agent for defendant, to be paid for in cash, and executed leases which he signed or caused to be signed in the name of the purchasers, and forwarded to defendant, plaintiff claiming that he followed a custom of the agency in so doing, for the purpose of keeping a record of the sale, and gained no profit by the transaction, presented a question of fact whether or not defendant had probable cause to arrest plaintiff for forgery.

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3. SAME — JUSTIFICATION — PROSECUTING ATTORNEY — ADVICE OF COUNSEL AS PROTECTION.

In order that the advice of the prosecuting attorney may constitute a defense to an action of malicious prosecution, it must be made to appear that full and fair statement of all the material facts was made to him by defendant: failure to state any material matters may raise an issue of fact, sufficiently justifying the court in leaving the issue to the jury.[1]

4. TRIAL—CONDUCT OF COURT—ARGUMENT.

It is the duty of the trial judge to be present and hear the argument of counsel to the jury, and although his absence may not amount to reversible error, he should be present and afford an opportunity to counsel to make objections and obtain rulings during the course of the argument.

5. MALICIOUS PROSECUTION—PROBABLE CAUSE—EVIDENCE.

Defendant was entitled to have given, as a part of the charge, a requested instruction that neither discontinuance of a prosecution nor discharge of the plaintiff on his examination established want of probable cause or plaintiff's innocence; and a charge that such discontinuance and discharge *prima facie* established want of probable cause was prejudicial to defendant's rights.

Error to Saginaw; Gage, J. Submitted April 28, 1913. (Docket No. 12.) Decided July 9, 1913.

Case by George W. Prine against the Singer Sewing Machine Company and others for malicious prosecution. Judgment for plaintiff. Defendants bring error. Reversed.

Weadock & Weadock, for appellants.

Julius B. Kirby, for appellee.

STONE, J. This is a suit to recover damages for alleged malicious prosecution growing out of prosecutions had upon two complaints made against the

[1] On the question of advice of counsel as defense to action for malicious prosecution, see note in 18 L. R. A. (N. S.) 49.

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plaintiff in the police court in the city of Saginaw by defendant Everal O. Beach, charging him with forgery and uttering forged instruments. The first count of the declaration is for malicious prosecution on account of forging and uttering as forged a sewing machine lease purporting to have been signed by F. H. Beach. The second count charges a like prosecution growing out of the prosecution for forgery and uttering as forged a sewing machine lease purporting to have been signed by A. F. Burwitz.

The declaration alleges that the prosecutions of plaintiff were instituted for the express purpose of compelling the payment of a claimed indebtedness to the defendant Singer Sewing Machine Company. This last-named defendant is a New Jersey corporation, organized on the 9th day of November, 1904, for the purpose of taking over from the Singer Manufacturing Company of New Jersey, and to conduct in that State and elsewhere, the business of selling and disposing of the sewing machines and other articles manufactured by the last-named company, and was duly licensed to carry on its business in this State. The Singer Manufacturing Company ceased to carry on business in this State on December 31, 1904.

Defendant Singer Sewing Machine Company from the time of its organization carried on its business in the State of Michigan and had a sales department or store in Saginaw, which was under the jurisdiction of Marshall M. Tatro, general agent, with an office in Chicago. This sales agency in Saginaw included the counties of Saginaw, Gratiot, Isabella, Tuscola, and Huron. Fred Schmidtill, supervising agent of said company for the lower peninsula of Michigan, had full charge of the Saginaw sales agency and had authority to discharge and did discharge the plaintiff as managing salesman on December 11, 1909. The plaintiff was employed on October 27, 1906, by writ-

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ten contract, as managing salesman for the said company at Saginaw, and in this capacity to sell and dispose of its sewing machines, parts and accessories, at its store at Saginaw and in the territory attached thereto. The contract provided that said company would, as it might deem best, furnish to said store its sewing machines, parts, etc., which were to be held as the property of the company, and sold or disposed of as such by the plaintiff or those under his management, at prices established for the time being by the company for the said territory, either for cash or under agreements made upon the forms and blanks of the company. By the terms of that contract the company agreed to pay the plaintiff in full for all his services:

"A salary at the rate of $35 per week (lost time to be deducted), which shall include the use, keeping, and maintenance of a horse and wagon to be used in the business."

It was further agreed that the contract might be terminated at the pleasure of either party. A new contract was entered into on June 15, 1908. By the terms of this contract the company agreed to pay to the plaintiff in full for all his services the following compensation, subject to the limitations thereinafter expressed:

"(A) A salary at the rate of $15 per week (lost time to be deducted), which shall include the use, keeping, and maintenance of a horse and wagon, to be used in the business."

"(B) A commission of 15 per cent. of the value of each sale or lease of a machine made at said store (except on a sale or lease made by an assistant managing salesman, where such is employed) at retail list prices fixed by the company; said commission to be computed on the list price after deducting allowances (if any) for old machines taken in exchange and discounts. This commission shall be payable only as payments in cash are made on said sale or lease and

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paid over to the company, and shall be at the rate of 50 per cent. of such cash payments until the full amount of commissions shall have been paid."

"(C) A remitting commission of 5 per cent. on the actual amount of money remitted from said store, said remittance to be made only from money remaining on hand after payment of the running expenses of said store and any advances from division headquarters, and is payable one week from date of each weekly report."

This contract contained the same clause as the first relating to the sale or disposal of machines at prices established for the time being by the company, either for cash or under agreements made upon the forms and blanks of the company. It also provided that the plaintiff would take proper care of and account for and deliver to the company or its authorized agent, on demand, all property of every description belonging to the company which might be intrusted to him or come into his possession or under his control. This last contract was in force at the time the plaintiff was discharged. Plaintiff gave a bond to the company, issued by the International Fidelity Insurance Company of New Jersey in the sum of $500, to secure the company against such direct pecuniary loss, not exceeding said sum, as it should have sustained of the employer's money, funds, or other personal property stolen or embezzled by said employee during and while in the actual performance of the duties of his employment as managing salesman of said employer. The plaintiff was always under bond while in the employ of the company.

There was employed in the store one Ethel M. Secord, as bookkeeper for the company. Her contract, under date of October 14, 1907, described her duties as follows:

"To act as bookkeeper for the company at its shop at Saginaw and in the territory attached thereto, and in this capacity to faithfully perform all the duties

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assigned to her, and in all respects to faithfully carry out its instructions."

Her stated compensation was $9 per week. This contract was signed by Miss Secord and the defendant Singer Sewing Machine Company, by the plaintiff, as managing salesman.

Sewing machines sent to the plaintiff at Saginaw were charged to that agency, and when sent out on sale or trial a record was kept on what was known as a stock card, called "lease or note record," on one side and "stock and trial record" on the other side. On the "stock and trial record" side of the card were noted the number of the order, the date received, the number of the machine, style of machine and woodwork, name of the salesman, the date sent out, and the name of the person with whom it was on trial. The lease or note record gave at the top the number of the lease, its date, name of lessee, name of salesman, commissions paid, the terms of the contract, the price, and the dates and amounts of payment pertaining to each machine. There was a cash book kept, but no ledger; the lease or note record taking the place of the ledger.

When a machine was sold for money paid to the store, it was the claim of the defendant that there should have been no lease made, but the money should have been remitted to the Chicago office. When sold on credit, then a lease should be made, signed by the lessee, accepted by the company, by some one of its agents, witnessed, and on the back were indorsed the name of the store, the number and date of the lease, the lessee's name, the style of the machine and number, price and payments, and whom the lease was effected by, and whom examined by. That, when a machine was sold either for cash or on time, the agent making the sale made a weekly report to the Chicago

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office entitled: "Report of ———, salesman and collector at Saginaw for week ending ———." In this report were written out the number of account or lease, the amount paid, amount selling commission retained, with other data, and said report was certified on the outside by the sales manager, giving a summary of the report and certifying that it showed all machines sold or leased, all cash collected or received by him since his last report; that the agent or managing salesman received full payment for all commission and expense item due to date; and that the cash drawn by him was in full of all demands, except commissions thereafter becoming due under the conditions of the contract of agency.

It was the claim of the plaintiff on the trial that machines put out on trial could not be left longer than one week, and that the manufacturing machines could not be left on trial at all, and the plaintiff testified that these instructions were given to him by the general agent of the Chicago office; that it was the practice of the Saginaw office, in certain instances, where machines were sold and delivered to responsible parties, who had not, on delivery, paid for the same (as was the case in both the Beach and Burwitz sales) or given a lease covering the machine, to place in the proper files "memoranda leases," purporting to have been signed by such parties receiving the machine; that the method pointed out above by defendant covers cash sales of machines at the time of delivery, machines placed out on trial, and lease sales, but does not cover a transaction where a responsible party would order a machine and have it delivered without paying for it at the time or giving a lease therefor; that the Saginaw office had made a practice of writing up leases and placing them in the files, to make a record of the disposition of particular machines, until settlement might be had, and in many instances

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parties purchasing machines would refuse to make and sign leases, and the bookkeeper would fill out these blanks, sign the name of the purchaser to the same, and file them in their proper places, to keep the record.

It appeared also that there was a cumulative report made which included all of the business for the year up to its date, and this was certified to and signed by the managing salesman and the bookkeeper. When the week-end or cumulative report was made up, the amount of money necessary to be remitted to the company would be known. The money coming to the agency at Saginaw was deposited in the Bank of Saginaw, in the name of the Singer Sewing Machine Company, generally by the bookkeeper. It was subject to check only by the plaintiff, as managing salesman, so that when the week-end report was completed, and the amount that had to be sent to the company ascertained, according to the report, if there was sufficient money in the bank, it was checked out by the plaintiff and a draft sent. If there was not sufficient money in the bank, plaintiff furnished the difference. The plaintiff testified that this did not happen often, but that it did happen, and the bookkeeper testified that that was the way in which the amounts were made up to go to the company; that in some instances, when there was not sufficient money in the bank, she was directed by the plaintiff to change the report to correspond with money on hand.

We quote the following from the direct examination of the plaintiff relating to the sales of machines to F. H. Beach and A. F. Burwitz on leases which were forwarded to the company:

"*Q.* Now this lease spoken of in Exhibit A, the complaint made by Beach, what was there to that within your personal knowledge?

"*A.* Mr. Beach ordered a sewing machine sent up to his factory, and he had bought seven or eight

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others previously; he ordered this in the same way—telephoned down for a sewing machine to be sent up there and said when he got around he would send a check for it. I can't fix the date.

"*Q.* Well, the memorandum we have * * * was on November 23, 1907.

"*A.* Well, it was some time previous to that when the machine was delivered. [Paper is here marked Exhibit G for identification at request of plaintiff's counsel.]

"*Q.* What is Exhibit G?

"*A.* It is a lease. It says F. H. Beach here.

"*Q.* What, if anything, on that piece of paper, is your handwriting?

"*A.* The witness mark, my own name, and my own handwriting, 'Geo. W. Prine.' I did not write anything else on that piece of paper. That form of lease had been used by me for the company right along. Used at every sale. I did not write the name F. H. Beach on the bottom of the lease that I was accused of forging.

"*Q.* Do you know how that came in the file or the case of the company, the Singer Company, what use was made of it, and why was it put there?

"*A.* It was sent to the company, a report of the sale of the machine to Mr. Beach.

"*Q.* And why?

"*A.* Why, to make up a certain number of sales each week that were held up for in the office, undoubtedly was reported for that purpose, as we—

"*Q.* Well, had the machine described there actually gone out of your stock?

"*A.* Yes, had previous to that, some time previous to that.

"*Q.* And at the time it went out did the cash come in to take its place?

"*A.* It did not.

"*Q.* And did the cash come in later?

"*A.* In the form of a check. [Check produced by defendants' counsel and marked Exhibit H for plaintiff.] Exhibit H is a check dated December 7, 1907. Is supposed to be a check as near as I can—

"*Q.* Well what— Is it a check for that machine of Mr. Beach's?

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"*A.* Yes, sir.

"*Q.* And what was done with the check which came to the office?

"*A.* I gave it to Miss Secord and she indorsed it on the back and deposited it in the bank—credited to the Singer Sewing Machine Company.

"*Q.* And did you have any use or benefit whatever from that check?

"*A.* Never handled the check; never had it in my possession. [A contract or lease is here marked Exhibit I for identification. Check is here marked Exhibit J for identification.]

"*A.* Exhibit I is the Burwitz lease, on which I was arrested, in the second arrest. That is one of the leases that I am charged with forging. In the second case, the writing on the body of the lease is mine. Reads: 'A. F. Burwitz, Saginaw, Michigan, West Side. Saginaw 15—2—20, 1912.'

"*Q.* And the bottom part, there there is a signature, did you write the signature?

"*A.* I did not.

"*Q.* Did you write anything more in the bottom of the paper than is explained?

"*A.* No, sir; the date on there I didn't write— I didn't write '19' after 'November, 1909.'

"*Q.* What became of that; that is whether it was put through the office or the company's books or—

"*A.* I left it on the desk; I don't know what became of it afterwards; probably sent; no way of finding out whether it was sent to the company.

"*Q.* State all you know about the history of the machine in that described.

"*A.* Mr. Howell, of Detroit, who has charge of the manufacturing department for the Singer Sewing Machine Company, sells the manufacturing machines to the different factories, to the stores here; we have no right to sell a manufacturing machine—that is, machines used in a factory. I sell those then that are used in the domestic; that is it. We sold several machines, but Mr. Burwitz, you understand, from the machines we have—Mr. Howell came to the store and handed me a slip of paper, and he said: 'You deliver a machine over there to this man; he will send you a check for it.' I did— I didn't do it; I sent one of

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my men over with the machine. They delivered it at the office, and that is the last I ever saw of the machine. It ran along for some time and they sent a check for the machine. That machine was taken out of our stock.

"*Q.* And what took its place?

"*A.* That report of sale that is on this lease here. Mr. Howell brought the check into the office and handed it, I think, to Miss Secord; if he didn't he handed it to me and I immediately handed it to Miss Secord. Exhibit J is the check to the best of my knowledge and is what was deposited in the Bank of Saginaw or the bank where they were doing business, by Miss Secord, to the credit of the Singer Company. The other check that was spoken of in the Beach case was deposited to the credit of the Singer Sewing Macine Company.

"*Q.* Did you ever get that back?

"*A.* No, sir; I don't think I did; I don't think I ever had it in my possession at any time after Mr. Howell handed it to Miss Secord.

"*Q.* Well, did you ever have any part of this check?

"*A.* Not one cent of it; no, sir."

Upon the trial of the case it was the claim of the plaintiff, and he gave evidence tending to show, that for a number of years before his arrests here complained of he had been the managing salesman of the defendant company at Saginaw; that he had never before been suspected of having been guilty of any crime or been arrested; that the defendant company and the defendant Fred Schmidtill were responsible for the other defendant Everal O. Beach making the complaints against him; that in the first case the defendant Beach for and on behalf of himself and the other defendants, and without any probable or reasonable cause to believe that the plaintiff was guilty or had committed the offense charged, and because plaintiff would not turn over to the other defendants a certain sum of $247 which he had collected as a representative of the said company, and the further sum of $250, and because the defendants had malice and

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ill will towards plaintiff, on December 28, 1909, made the complaint in the police court aforesaid charging him with having on November 23, 1907, falsely and feloniously forged the instrument called the F. H. Beach lease, and also with having feloniously uttered and published as true said F. H. Beach lease with intent to defraud; that he was arrested and imprisoned on the warrant issued on said complaint, and that finally, upon the preliminary examination upon said charge, the case was dismissed on motion of the prosecuting attorney, and the prosecution ended; that a few days after plaintiff was so discharged the said defendant Everal O. Beach, acting for himself and under the authority of the other defendants, and actuated by the malice of himself and the other defendants, and without any reasonable or probable cause, made another complaint in said police court charging that on November 20, 1909, the plaintiff did forge and counterfeit a certain instrument, called in this case the A. F. Burwitz lease, and also with having feloniously uttered and published as true said Burwitz lease with intent to defraud; that upon the warrant issued on said last-named complaint he was arrested and taken before the magistrate, and upon the preliminary examination he was by the magistrate discharged from arrest, and the prosecution was ended.

It is the claim of the defendant Singer Sewing Machine Company that it did not authorize and was in no way connected with the prosecutions of the plaintiff; that whatever was done was under the direction of the International Fidelity Insurance Company and under the direction and supervision of the prosecuting attorney; and that it is not liable in any event. The defendants further claim under the evidence that the plaintiff was the managing salesman of defendant company during the years named; that his business was to oversee the affairs of said company; that he sold

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a machine to F. H. Beach in the year 1907 for the sum of $36.61, and delivered the same to him; that at the time of the sale and delivery there was no understanding or agreement with said Beach to enter into any written lease or agreement with reference to such purchase, and that thereafter and on or about November 23, 1907, the plaintiff, with intent to injure and defraud the company, directed and assisted in preparing a lease purporting to be signed by said Beach for the sale of the machine aforesaid; that therein the purchase price of the machine was increased, the time and amounts of payments and the amount of commissions to be paid altered; that said Beach paid for the machine in full; that plaintiff did not remit the full amount paid by Beach, but only payments thereon, and those payments neither as large nor as soon as provided for in the lease; that plaintiff well knew all these facts; and that by his connection with the preparation of the fictitious Beach lease, and forwarding the same to the company's office in Chicago, he was guilty of committing the crime of forgery of said lease and uttering the same as a forged instrument. The defendants also claim that in the fall of 1909 the defendant company, through Mr. Howell, its agent from Detroit, sold a machine to A. F. Burwitz of Saginaw for the sum of $32.40, and that there was no contract, lease, or obligation to be made by said Burwitz for the machine, and that Burwitz paid for the machine in full on November 4, 1909; that on or about November 20, 1909, the plaintiff prepared a lease purporting to be signed by A. F. Burwitz, covering the sale of the machine to A. F. Burwitz; that this alleged lease was not signed by A. F. Burwitz or by his consent, knowledge, or ratification; that it changed the amount of the purchase price, the commission to be paid or earned, and the amount and time of payments on the sale; that

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said lease so prepared was forwarded to the office of the defendant company, to which the plaintiff had to account, as a valid lease; and that plaintiff did not remit the amount paid by Burwitz but only a part thereof, and that this lease was forged by the plaintiff, with intent to injure and defraud, and that plaintiff was guilty of uttering the said lease as true with like intent.

The defendants claim that these facts did not come to their knowledge until the last of November or first of December, 1909; that upon the information coming to Mr. Schmidtill, from the said bookkeeper, he employed a competent person to examine the accounts in the office of the Saginaw agency and the sales of said machines to said Beach and Burwitz and found that the machines had been paid for and that no leases had ever been signed or authorized to be signed by either Beach or Burwitz and had never been ratified by either of them; that the plaintiff had admitted to Miss Secord, the bookkeeper, that he was short in his accounts with the company, which shortage included the balances due on these two leases; that Schmidtill came to Saginaw and saw the plaintiff and attempted to make a settlement of the money affairs between the plaintiff and the company, which attempt was fruitless; that plaintiff made a claim of an indebtedness due him from the company; that thereafter the defendant company reported all of the facts to the International Fidelity Insurance Company, and said last-named company directed Schmidtill to submit all the facts coming to his knowledge with reference to the alleged forgeries of the Beach and Burwitz leases to some attorney, and thereafter submit the same to the prosecuting attorney, giving the latter all material facts, and submit to and be guided by the advice of the prosecuting attorney in the premises; that thereafter Schmidtill, as directed, fully, fairly, and in

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good faith stated all of the material facts with reference to said two leases to the prosecuting attorney of Saginaw county, and after such statement that officer determined that complaint should be made against the plaintiff, charging him with forging and uttering as forged the said Beach and Burwitz leases, and that upon the direction of the prosecuting attorney the complaint against the plaintiff in both cases was made by the defendant Everal O. Beach; that from the time of the statement to the prosecuting attorney, the making of the complaints, and the prosecution thereof, up to and including the final action in both of said cases, they were under the direction, advice, and control of the prosecuting attorney. The defendants further claim that the plaintiff was guilty of the offenses charged; that whatever was done by them, or either of them, was done after the material facts were fully and fairly stated to the prosecuting attorney, and without malice; and that in no event are they, or any of them, liable in this action.

The defendants made a motion for a directed verdict at the conclusion of the evidence on the grounds that plaintiff was guilty of the offense with which he was charged; that the criminal cases were commenced and conducted by the prosecuting attorney after a statement of all the material facts; that there was no evidence of malicious prosecution; and that there was no evidence that defendant Singer Sewing Machine Company authorized or had anything to do with the prosecutions, which motion was overruled and exception taken.

The defendants requested the court, by their numerous requests, to direct a verdict in their favor, which requests were not given. The case was submitted to the jury, and plaintiff had verdict in the sum of $5,783 against all of the defendants.

The defendants made a motion for a new trial on the grounds:

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(1) That the court erred in overruling the motion for the defendants for a directed verdict.
(2) That the court erred in its charge to the jury.
(3) That the verdict was against the weight of the evidence.

The court denied the motion, giving reasons therefor, to which exception was duly taken. The defendants have brought the case here upon writ of error, and there are 72 assignments of error in the record. Appellants' counsel state that the law questions arise:

(a) Upon the rejection and striking out of evidence.
(b) The action of the court in denying the motion at the conclusion of the evidence for a directed verdict.
(c) Error in the argument of plaintiff's counsel.
(d) The refusal of the court to charge as requested.
(e) The charge as given.
(f) Refusal of the court to grant a new trial.

(a) A careful examination of this record has not disclosed to us any prejudicial error of the trial court in the rejection or striking out of evidence upon the trial or in the rulings relating to the admission of testimony. Counsel have not dwelt upon this branch of the case either in their briefs or oral arguments.

(b) This brings us to one of the important questions in the case. It is the claim of appellants' counsel that the court should have directed a verdict in favor of defendants upon numerous grounds. First they say that it appears by undisputed evidence that the plaintiff was guilty of both offenses of forgery and uttering forged instruments with which he was charged, and that therefore there can be no question that there was probable cause to justify prosecution in both cases. We are not prepared to say that upon this point the evidence was such as would have warranted the court in charging the jury, as matter of law, that the plaintiff was guilty of either of the offenses charged.

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The intent to defraud is the gist of the offenses of forgery and uttering forged instruments as true, knowing them to be forged; and we cannot say, in the light of this record, as matter of law, that the plaintiff was guilty of either of these offenses. We think it was a question for the jury whether, under the evidence, there was probable cause to justify the prosecutions of plaintiff.

The most serious question is whether the evidence shows conclusively that the prosecutions of the plaintiff were under the direction of the prosecuting attorney, after the statement of all the material facts within the knowledge of the defendant Schmidtill. The circuit judge himself, as shown by this record, expressed doubt upon the question when the motion was made for a directed verdict upon this ground but refused to grant the motion. Our first impression was one of doubt as to the correctness of the ruling of the learned trial judge upon this question; but a more careful examination of the record has led us to the conclusion that the court did not err in denying the motion and in submitting the case to the jury upon this point.

Counsel for plaintiff, in their brief, have pointed out some 13 reasons why the statement made by defendant Schmidtill to the prosecuting attorney did not disclose all the facts. We are unable to agree with plaintiff's counsel in all of these claims, but we think there is force in the following: It appears that Mr. Schmidtill did not advise the prosecuting attorney that the plaintiff did not write the name of F. H. Beach upon the Beach lease, upon which the charge of forgery was based. We think it appears from the testimony that the claim was made to the prosecuting attorney that the plaintiff wrote the name of Beach, purporting to be the signature of the latter upon the lease. It turned out upon the trial that this was not

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true, but it was claimed by defendants' witnesses that the plaintiff directed the signing of this name, which was as earnestly denied by the plaintiff in his testimony. The prosecuting attorney substantially stated in his testimony that he was led to believe and relied upon the statement that the plaintiff had signed the name of Beach to this lease, and that the prosecution was dismissed because the contrary appeared. It further appears that Mr. Schmidtill failed to disclose to the prosecuting attorney that in his interview with the plaintiff there had been an attempted settlement or that he had threatened the arrest of the plaintiff if he did not come to a settlement with the company. It was denied by Schmidtill that he made such threat, but the same was testified to by plaintiff, and Schmidtill testified that, had the plaintiff settled, no complaint would have been made to the prosecuting attorney; and the disclosure should have been very full upon this subject. Neither did Mr. Schmidtill advise the prosecuting attorney that there had been a practice at the agency of making what might be termed "memoranda leases," as it is claimed by plaintiff was done in this instance to keep the record in proper condition. We deem this a very material fact and one which should have been ascertained and disclosed by Mr. Schmidtill in order that the prosecuting attorney might be possessed of the facts in the case. This applies especially to the Beach case. Neither does it appear that it was disclosed to the prosecuting attorney that when the Beach sale and lease were made the plaintiff was working under a contract in which he received no commissions but a straight salary of $35 per week. This was important as bearing upon the question of intent or motive of the plaintiff.

It is urged that it is difficult to see how in any way the plaintiff would be benefited by making such a lease, as a genuine instrument, stating a larger sum

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than the machine was sold for, when he would be required eventually to account for the larger sum. The condition of the two leases, when shown to the prosecuting attorney, is in dispute. It is difficult to glean from the testimony just what the witnesses mean when they testify that certain erasures were made upon these leases at or about the time they were submitted to the prosecuting attorney. It appears that subsequent to the discharge of the plaintiff these leases had been balanced so that it appeared that the whole amount due the company thereon had been paid. Just when these last entries were erased, whether before or after they were shown to the prosecuting attorney, is a subject that even counsel are not agreed upon. The presenting of those leases to the prosecuting attorney, showing that they had been balanced and nothing was due upon them, might have been a material fact, and certainly he was entitled to know all the facts relating thereto; and, if erasures had been made thereon, he was entitled to an explanation of such erasures and why made. If it should turn out that there was no probable cause for making the complaint in the Beach case, and that the same was made to force the collection of a claim, and was made maliciously, there might be foundation for this suit even if in the Burwitz case there was probable cause and the complaint properly made. These are some of the reasons that have led us to the conclusion that the court did not err in not taking the case from the jury upon that ground.

(c) Complaint is made of the argument of plaintiff's counsel before the jury, and the question raised presents a peculiar condition. The arguments complained of seem to have been objected and excepted to by appellants' counsel at the time, but the trial judge states in his charge that he was not present and did not hear these arguments, because he was other-

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wise engaged. A memorandum of the objections appears to have been made by appellants' counsel, and the court's attention called to the objectionable matter later, at the time of the charge, and the court instructed the jury upon the subject. We have ruled that the circuit judge should have his attention called to objections, and he should be given an opportunity to pass upon objections to improper arguments when made; but what should be done when the circuit judge is not present to make rulings? This presents a new question which we do not find it necessary here to pass upon, for the reason that the case must be reversed upon another ground. But we do think we should say that in our opinion it is the duty of the trial judge to be present and in attendance and to hear the arguments of counsel to the jury, and be in a position to rule upon objections when they are made to any part of the argument. This question will not probably arise upon a new trial.

(d), *(e)*, and *(f)* may be considered together. We have examined the charge in this case with great care, and in the main it seems to have presented the case very fully and fairly to the jury.

By the thirty-sixth assignment of error complaint is made because of the refusal of the court to give defendants' twenty-fifth written request, which is as follows:

"I charge you, as matter of law, that neither discontinuance of the *Beach Case* or the discharge of plaintiff on his examination on each of these complaints does not show want of probable cause, or that plaintiff was innocent of the offense with which he was charged."

One of the assignments of error is based on the charge of the court as given, as follows:

"Now, while it devolves upon the plaintiff to establish want of probable cause, I instruct you that, when the records were introduced here showing that he

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had been discharged on each of the complaints in question, that *prima facie* established a want of probable cause on the part of the man prosecuting."

This was one of the errors urged upon the court in the motion for a new trial. Referring to the same, the learned circuit judge, in his reasons for denying the motion, said:

"This matter was brought up on the trial of the case on the motion to direct a verdict, and at that time plaintiff produced authorities from the second edition of Judge Cooley's work on Torts sustaining his position, and also some other cases which indicated that that was the rule of law. The court expressed his surprise that such could be the law and stated that it was contrary to his understanding, but, as counsel for the defendant did not produce authority to the contrary, when the court came to instruct the jury he assumed that this was the law and gave the instructions at the request of the plaintiff. A subsequent investigation satisfied the court that this was not the law in this State, and that this instruction was an error; but in view of the very full instruction given to the jury in the charge, in reference to what constituted probable cause, the court is satisfied that it was error without prejudice to the defendants."

The sixty-ninth assignment of error is based upon the refusal of the court to grant a new trial on this ground.

In *Davis* v. *McMillan*, 142 Mich. 391 (105 N. W. 862, 3 L. R. A. [N. S.] 928, 113 Am. St. Rep. 585, 7 Am. & Eng. Ann. Cas. 854), this court held that the discharge of one accused of crime has not, of itself, any tendency to show want of probable cause for instituting the prosecution. The opinion in that case was written by the late Justice HOOKER. He said among other things:

"It has been frequently held that an acquittal does not necessarily show want of probable cause. It is doubtful if the converse has ever been held; for, if it were, it would seldom be safe to institute criminal

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proceedings, as conviction must always be an uncertainty under the rule of reasonable doubt, and the proceeding, being for the avowed purpose of ascertaining whether a person is guilty or not, necessarily implies a degree of uncertainty in the institution of the proceedings. In 19 Am. & Eng. Enc. Law (2d Ed.), p. 665, the author of the subject states that some cases hold that acquittal is not alone *prima facie* or *per se* sufficient evidence of want of probable cause, and expresses the opinion that the better doctrine is that it is (alone) no evidence whatever of the want of probable cause. * * * We think it can safely be said that the weight of authority denies the rule that discharge by a magistrate upon request of the prosecuting attorney is *prima facie* evidence of want of probable cause. * * * We feel warranted in saying that the discharge of the defendant in this case has not in itself any tendency to show a want of probable cause."

We think that the doctrine of this case should be adhered to.

In the instant case it will be borne in mind that on the Beach complaint the prosecution was dismissed upon the request of the prosecuting attorney. Notwithstanding the very full instruction given to the jury in the charge in reference to what constituted probable cause, we are constrained to hold that the error of the trial judge in the instance pointed out was prejudicial error and was not cured by the remainder of the charge, and that it is our duty to reverse the case for that reason.

We do not think the court erred in submitting the case to the jury as to all of the defendants. We think it was a fair question for the jury whether the witness Schmidtill was acting solely for the insurance company or whether he was acting also as supervising agent of the defendant company. Nor can we say that the action of Mr. Tatro, the general agent, in sending the witness from Chicago and furnishing

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the documents and information from the general office was wholly in the interest of the insurance company. He had plenary power in the case. That he had such power is not denied. *Zart* v. *Sewing Machine Co.*, 162 Mich. 387 (127 N. W. 272).

We are not prepared to say that the court erred upon that portion of its charge relating to the measure of damages or that there was any reversible error other than has been pointed out.

For the error indicated, the judgment of the circuit court is reversed, and a new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

RICE *v.* KALAMAZOO CIRCUIT JUDGE.

PROCESS—AFFIDAVITS—CAPIAS AD RESPONDENDUM—KNOWLEDGE OF AFFIANT—MOTION TO QUASH.

On motion to quash a writ of *capias ad respondendum*, issued on plaintiffs' affidavit that they were induced to take defendant's note for a balance due, in an exchange of property, by false representations of defendant, who stated that he owned several houses and lots, and that a surety on the note owned certain property; that affiants had *ascertained* that defendant did not own the houses as represented, and the surety did not possess the property stated, the writ should have been quashed, for the reason that affiants could not have personal knowledge as to the ownership of the property, and the affidavit was insufficient.

Mandamus by Eugene W. Rice against Frank E.

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Knappen, Kalamazoo circuit judge, to compel respondent to quash a writ of *capias ad respondendum.* Submitted May 6, 1913. (Calendar No. 25,572.) Writ granted July 9, 1913.

Titus & Titus, for relator.

Fred A. Mills (Frank F. Ford, of counsel), for respondent.

OSTRANDER, J. A motion to quash a writ of *capias ad respondendum,* upon which relator had been arrested, was overruled, and relator asks for the writ of mandamus to compel the granting of the motion. The only question presented is whether the affidavit attached to the writ warranted the indorsement of an order to hold to bail.

The affidavit advises the court that in a trade of property, real and personal, owned by the plaintiffs, for land owned by relator, a difference of $300 was agreed to be paid by relator. For this difference relator induced plaintiffs to take his note, with a signer. The original bargain is not repudiated. The note has not been paid, and it is the claim of the plaintiffs that they were induced to accept the note and to complete the trade, which had been arranged by fraudulent representations of relator respecting his own financial responsibility and that of the person who signed the note with him. It is claimed, also, that the arrangement was that this note was to be signed by relator's wife, and was not, and the fact that she had not signed it was discovered after the note had been accepted and the papers exchanged. In the affidavit for the writ it is stated that deponents finally agreed to accept a note for $300 if defendant (relator) "would have his wife sign it and also get a good, responsible signer besides." The representations of financial responsibility which it is alleged were relied upon are,

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as to the surety, that he owned three or four houses and lots that he rented, besides the one he lived in, and owned a one-half interest in a brickyard in the north part of the city of Kalamazoo, and as to the financial condition of relator they were that he owned in his own name eight houses and lots that he rented, two of which were on Gull street, and that he was financially responsible and perfectly good for the amount of said note, and that the same would be paid when the said note became due. As to the representations alleged to have been made by relator concerning his own responsibility, affiants state that relator after the note became due told them he owned nothing, but would procure for them, in exchange for the note and some other property, and convey to them, a small piece of land and house, and if the proposition was not accepted, he would go into bankruptcy, that they have *ascertained* that relator did not own eight dwelling houses and lots that he rented as he represented he did, and that his representations in that regard were wholly untrue. Affiants say further they have looked up the financial standing of the said surety and have *ascertained* that at the time he signed the note he did not own three or four houses besides the one he lived in, and did not own a one-half interest in a brickyard in the north part of the city of Kalamazoo, and have ascertained that he does not own any houses and lots, and did not at the time the note was given, and never owned an interest in said brickyard. Affiants state, as of their own knowledge, that the surety was living in a rented house when the note was executed and when it was delivered to affiants.

The affidavit is criticised because it lacks necessary precision of statement, and because material statements therein are apparently made upon information and belief. Affiants have, they say, ascertained that the maker of the note and his surety did not own

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property as represented. How have they ascertained it? We think it is apparent that they would not be permitted to testify that the debtor, or his surety, did not own the property, unless the affiants themselves owned it. If affiants owned it, then, of course, the alleged representations were not relied upon. The maker of the note admitted that he had nothing, but the alleged admission does not refer to the time when the note was made and delivered. Affiants would know what representations were made to them. It is not apparent that they would now have personal knowledge that they were false. The point is ruled by *Gardiner* v. *Wayne Circuit Judge,* 155 Mich. 414 (119 N. W. 432), in which case it was said:

"The statement that affiant had learned that Gardiner was not the owner of the land in fee simple is not a statement of personal knowledge. It was incumbent upon affiant to show the source of his information, and to attach the affidavit of the person who had the requisite knowledge. The affidavit does not state that he has made an examination of the record, or that Gardiner admitted that he had not the title. * * *"

The writ will issue.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, and BIRD, JJ., concurred. KUHN, J., did not sit.

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PALMER-STEVENSON CONSTRUCTION CO. *v.* MASON CIRCUIT JUDGE.

1. NOTICE—PRACTICE—SERVICE BY MAIL—COURT RULES—NOTICE OF TRIAL.

   The right to serve notice of trial or other papers, by mail, under Circuit Court Rule 28*e*, on an attorney living in the same town, is not dependent on any contingency such as the attempt to first obtain service by other customary methods, and a party may resort to service by mail in the first instance, although the effect may be to cut short the time specified by rule or statute.

2. MANDAMUS—USELESS ORDERS—DISCRETIONARY NATURE OF REMEDY.

   Mandamus, being a discretionary writ, will not issue to compel a circuit court to restore a case to the calendar, from which it was stricken, and proceed with the trial, after the term has passed.

Mandamus by the Palmer-Stevenson Construction Company against Charles A. Withey, Mason circuit judge, to require respondent to vacate an order striking a cause from the calendar and to proceed with the trial. Submitted May 28, 1913. (Calendar No. 25,671.) Writ denied July 9, 1913.

A. A. Keiser, for relator.

STEERE, C. J. The object of this proceeding is to obtain a construction of subdivision "*e*" of Circuit Court Rule 28, relative to service of papers by mail.

The material and undisputed facts which present the question are, briefly, as follows: An action was pending and at issue in the circuit court of Mason county between A. E. Cartier Sons Company, plaintiff, and Palmer-Stevenson Construction Company,

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defendant; A. A. Keiser being attorney of record for defendant and Robert J. Quail attorney of record for plaintiff. The residence and business address of each was Ludington, Mich. Plaintiff had noticed the case for trial at the January, 1913, term of said court, but defendant had not done so. Plaintiff countermanded its notice before the commencement of the term, and the case was, on motion, stricken from the calendar. The first day of the succeeding term of court in Mason county was April 1, 1913. Each noticed the case for that term. Plaintiff's notice was countermanded. Defendant's notice was served by mail. Proof of this service was duly filed in the case, and shows that a notice, the form of which is not questioned, was served on the 15th day of March, 1913, upon the attorney of record for plaintiff—

"By depositing the same in the post office in the city of Ludington in an envelope securely sealed and plainly addressed to said Robert J. Quail, at Ludington, Mich., and that the postage thereon was fully prepaid to the place of destination."

The case was duly placed on the calendar of the April term of said court, and upon the first day of said term plaintiff's attorney moved the court to strike the cause from the calendar for the reason that no legal notice of trial had been served upon him, filing an affidavit stating that he first received the notice in question by taking it from his box in the post office on the morning of March 18, 1913; also stating that his office was open with a clerk in charge from 9 a. m. until 5 p. m. March 15th and 17th, and that he was personally present in his office a large portion of March 15th until 6 p. m. The court, after hearing arguments of counsel for the respective parties, struck the case from the calendar, for the reason that the same had not been properly noticed for trial.

In answer to an alternative writ of mandamus issued from this court, respondent states that the

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case was stricken from the calendar because in the opinion of the court service under subdivision "*e*" of Rule 28 is permissible only in case personal service is not feasible; that an effort should be made to make personal service before resorting to the other modes specified in the rule; that no additional time is provided for in case of service by mail, and, if the construction contended for by relator is adopted, it legalizes, in effect, shortening the time of service of notice one day, which can always be accomplished by mailing the notice after business hours of the last day. Rule 28 provides:

"When the attorney for the adverse party resides or has his office in the same city, village or township as the attorney making the service, papers shall be served as follows:

"*(a)* By delivering the same to the attorney personally.

"*(b)* Or, by leaving the same in his office with his clerk, or with a person having charge thereof.

"*(c)* Or, when no person is to be found in his office, by leaving the same, between the hours of six in the morning and nine in the evening, in some suitable and conspicuous place in such office.

"*(d)* Or, if the office be not open, so as to admit of service therein, then by leaving the same at the residence of the attorney with some person of suitable age and discretion.

"*(e)* Or, by depositing the same in the post office of the city, village or township, inclosed in an envelope, plainly addressed to such attorney, with postage fully prepaid."

This rule is a substitute for former Circuit Court Rule 7, which made no provision for service by mail when the attorneys resided or had their place of business in the same city, village, or township. It is a rule of general application for service of papers between members of the bar of the same locality in matters wherein they represent opposing parties in the circuit court. The saving of time, convenience,

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and general desirability of service by mail was recognized by adding subdivision "*e*" when the rules were revised in 1899, and to the same purpose it was required by other rules then adopted that counsel in beginning suit or giving notice of appearance should furnish their business address. Attorneys who preferred for any reason to follow the former methods were authorized to do so. They could search out opposing counsel, wherever he might be, and deliver the paper to him personally, or, at their option, go to his office, and leave it with some one in charge. Failing in finding any one present, and only on condition no one was present, the paper could be left in the office in a suitable place during business hours, if the office was open. If it was closed, then, and only then, if the residence of the attorney was known or could be found, by going there and leaving it with some person regarded as of suitable age and discretion.

No such conditions precedent are imposed on serving by mail. There is nothing in subdivision "*e*," or the rule in its entirety, to suggest that previously provided methods must be exhausted before mailing is resorted to. With improved and perfected mail facilities, attended by prompt distribution or prompt delivery, service by mail can now well be recognized as reasonably safe and satisfactory, when the message is plainly addressed and postage prepaid. The use of the disjunctive conjunction "or" in that connection naturally indicates an alternative, implying discretion, giving a choice between delivery to the attorney personally, delivery to a clerk or person in charge of his office, and mailing to his address with the postage prepaid; those three authorized methods of service being specified in the rule without any restrictive contingencies. To make service by mail contingent upon inability to make service by the preceding specified methods would nullify subdivision "*e*," for the possi-

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bility of service by those methods exists, and resort to them cannot be held to have failed, until and when the time within which service may be made has expired. Service by mail is usually more convenient and expeditious, is reasonably safe and certain, simplifies and facilitates the transaction of legal business between attorneys, and it does no violence to the language of the rule to interpret it as authorizing that method of service at will. We think such is the manifest purpose and intent of said subdivision "*e.*" It is true no additional time for service by mail is required under this rule, as in cases where the attorneys reside, or have their office, at some other city, village, or township, and it may be possible, as pointed out, to take advantage of this to curtail, in effect, the specified time of service by part or all of a day, but this, if a defect, may and should be remedied by an amendment of the rule, rather than by a forced or restrictive construction which tends to defeat its usefulness.

At the time of respondent's return to the alternative writ issued herein, and final submission of the proceedings in this court, the circuit court term, at which the order striking the case from the calendar was made, had passed. To now make the alternative order peremptory would be ineffectual and a vain thing. Respondent's return was in good faith, and, as we are advised, chiefly to obtain an authoritative construction of the rule in question. The proceeding legitimately raises that question, and we have accordingly considered and decided it. Mandamus is a discretionary writ and will not issue in all cases, even where a *prima facie* right to it may be shown.

At this time, and for the reason stated, the alternative writ will not be made peremptory. No costs are allowed to either party.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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AUSTIN v. HAYDEN.

1. EVIDENCE—BOOKS OF ACCOUNT—ACCOUNTING—TORT-FEASORS.
   Books of account of an insolvent brokerage firm, showing the balances due to certain customers or creditors, were admissible in evidence, on an accounting, in which a correspondent firm is held to have been a joint tort-feasor with the insolvent in dealing with or converting securities entrusted by customers to the insolvent brokers.

2. INSOLVENCY—MARSHALING ASSETS—BROKERS—RECEIVERS.
   In determining priorities among claimants from assets of an insolvent firm of brokers, defendant brokerage firm, which was held to have notice of the equities of claimants after a date fixed by the decree of the court, was correctly required to account to customers of the insolvent who had cash balances to their credit on the day stated: their accounts were not blended so as to deprive them of this right by purchasing or dealing in securities subsequent to that date.

3. SAME.
   Also, claimants, who on the date in question owned securities on margins in possession of the insolvent and were entitled to a considerable credit balance at that time, although they thereafter continued trading, were rightly allowed to trace their stock into the hands of the defendant correspondent as preferred claims.

Appeal from Wayne; Mandell, J. Submitted June 3, 1913. (Docket No. 1.) Decided July 9, 1913.

Bill by Fred G. Austin as receiver of Cameron Currie & Company, a copartnership, against Charles Hayden and others, copartners as Hayen, Stone & Company, for accounting and other equitable relief. Numerous intervening claimants presented claims for adjudication. Upon an appeal previously taken, a restatement of account was ordered by this court.

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From the final order entered, defendants Hayden, Stone & Company appeal. Affirmed.

Angell, Boynton, McMillan, Bodman & Turner, for complainant.

Alex J. Groesbeck and *Guy A. Miller*, for intervener Miller.

Miller, Smith, Paddock & Perry, for intervener Hager.

Stevenson, Carpenter & Butzel (Henry W. Beal, of counsel), for defendants.

BROOKE, J. This case is now in this court a second time upon appeal. The opinion rendered in the earlier appeal will be found reported in 171 Mich. 38 (137 N. W. 317). The decree entered in this court in accordance with that opinion directed a recasting of the account by the court below and the making of a new classification. The decree provides:

"In such reclassification 'all claims arising on and after June 23, 1908, out of transactions, whether on margins or otherwise, in which defendants participated and ownership in property is satisfactorily traced shall constitute a new class to be collected in full from defendants,' and such claims when collected shall, in the final distribution of the fund in complainant's hands, be paid in full, less their proper proportion of the expenses of the receiver. Where identification of ownership cannot be determined by the court, claimants shall not participate in said new class, though shown to have dealt with Cameron Currie & Co. on and after said June 23d; but where ownership is satisfactorily traced by an intervener in dealings participated in by Hayden, Stone & Co. after that date their liability shall be determined irrespective of whether or not they yet held the securities so traced to them, on July 18, 1908. *No distinctive benefit shall accrue to any intervener from the blending of his accounts in transactions with Currie & Co. before and after said June 23d*, but his claim or claims

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shall be individually determined as in case of separate person or persons, in one or more classifications, according to the facts found and as his relative right of participation may appear. In such readjustment, *defendants shall not be required to account twice for any stocks or securities traced as belonging to individual owners,* and in balancing defendants' liability and lien in relation to the total sum paid and to be paid complainant by defendants from the proceeds of sales of all stocks and securities heretofore held by them and disposed of by order of the court, due allowance shall be made for any stocks or securities, or the proceeds thereof, so traced, which are shown to have already come into the possession of complainant in such manner that further decree for their value would impose upon defendants double payment therefor."

Obeying this mandate, the Wayne circuit court recast the account, with the result that defendants' liability was increased by the sum of $142,649.56. Defendants have again appealed, claiming that, through an erroneous application of the language of the decree to the facts relating to certain claims of interveners, the above-mentioned sum is too large by $18,969.46. Defendants have classified the questioned items under three heads "A," "B," and "C," and we will follow this classification in discussing the matters in dispute.

Under class A there are four accounts, as follows:

A. B. Anthony	$280 63
A. A. Bleasby	733 28
Harry Myers	67 08
John M. Cook	1,081 71
Total	$2,162 70

As we understand defendants' contention with relation to these items, they object to their allowance upon the sole ground that the interveners named did not appear in court personally and give evidence as to their claims. The accounts were proven by the evidence of Mr. McPherson, the expert accountant

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who appears to have made a very thorough and painstaking examination of the books of Currie & Co. at the instance of the trustee. Under our former holding that on and after June 23d defendants were joint tort-feasors with Currie & Co., the books of Currie & Co. were competent evidence against defendants. Aside from this, defendants do not claim nor intimate that the items questioned are in any particular incorrect. We think they were properly allowed.

In class B there are six items, as follows:

Moses Blumrosen	$2,806 31
L. A. Clapp	536 43
Arthur Deyoe	411 99
William A. Peters	268 33
Julius Hager	3,823 35
S. L. Smith	4,682 32
Total	$12,528 73

With reference to these six interveners it is the claim of defendants that their right to be included in the classification AA and receive from defendants compensation in full is based on a blending of each of their several accounts before and after June 23d, which is forbidden by the decree.

An examination of the accounts of the first four above-named interveners shows that in each case the intervener had on June 23d a cash credit balance upon the books of Currie & Co. with no stock transactions then outstanding or incomplete. Thereafter and before July 18th, in each instance this balance was in whole or in part converted by the intervener into certain stock which has been satisfactorily traced to defendants under the terms of the decree. Defendants contend that this transaction constituted a blending of accounts within the meaning of the decree because the purchases were made on the strength of credit balances existing on or prior to June 23d.

We do not agree with this contention. The record

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shows that Currie & Co. paid money demands freely up to the date of their suspension. It is fair to presume, therefore, that had these interveners demanded their money they would have received it. They would then have handed it back to Currie & Co. with instructions to purchase. Had they followed this course, defendants would not claim that they were not entitled to the classification they have received under the new decree. The fact that they did not go through this useless proceeding should not, in our opinion, be permitted to affect their rights.

As to the interveners Hager and Smith: These two accounts are different in form, though perhaps not in principle. On June 23d each of these men had an account with Currie & Co. which had been running for some time. They were each carrying a considerable number of shares of stock upon margin. Currie & Co. held the stock as security for the unpaid balance. Had they closed their accounts with Currie & Co. on June 23d, each would have had a cash credit balance of several thousand dollars. Instead of doing this, they continued trading, with the result that on July 18th defendants had in their possession certain stocks which the interveners could clearly trace and in which they held a considerable margin interest. We have concluded, though with some hesitation, that the lower court was correct in including these two accounts in the preferential class AA, and that the transactions out of which this result flows do not constitute such a blending of accounts as is forbidden by the terms of the decree.

In class C there are three items:

Lydia Carleton	$247 18
Carrie Hudnut	423 65
M. P. Scott	3,749 21

These three interveners all dealt with Currie & Co. after June 23d, and, so far as appears by the record,

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had not dealt with them before that date. They therefore are clearly entitled, under the terms of our former decree, to the classification given them.

Defendants do not controvert this position, but urge that in accounting directly to these three interveners they are compelled to account twice for the same stock, which is in terms forbidden by the decree of this court.

It is clear that in paying directly to these interveners through the receiver defendants account once for the stock, and thus discharge their entire liability touching the same. In the general accounting between the defendants and the receiver, therefore, the transactions out of which these three balances grow must be entirely eliminated and the account stated as though they had not taken place.

With reference to the claim of intervener Guy A. Miller, it appears that he was classified in AA for the sum of $4,891.57 upon the theory that the 100 shares of stock purchased by him were fully paid for. As a matter of fact he paid thereon $500 in cash and gave a check to Currie & Co. for the balance. This check was deposited with the People's State Bank, and Currie & Co. had credit therefor. Miller refused to pay the check, and suit was brought thereon by the bank. Defendants ask that Miller's claim be reduced to $613.54, and that they be permitted to undertake his defense in the suit upon the check and save him harmless. To this course Miller now assents. The decree will be so modified.

Except in the particulars pointed out, the decree of the court below stands affirmed.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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PEOPLE v. DANENBERG.

1. CRIMINAL LAW—TIME—EVIDENCE.
   The time of committing the alleged offense of taking property from a boat in the daytime was not a question to be determined by the court, under evidence that tended to support the information.

2. SAME—TRIAL—CROSS-EXAMINATION—EXTENT.
   It was not erroneous to permit the prosecution to question respondent, who took the stand in his own behalf, concerning his character, associations, and offenses committed subsequent to the crime alleged.

3. APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW—EXCEPTIONS.
   In order to review alleged objectionable argument of the prosecuting attorney, in a criminal case, it is essential to make objection and obtain a ruling of the court.

Error to Saginaw; Gage, J. Submitted June 13, 1913. (Docket No. 125.) Decided July 9, 1913.

Joseph Danenberg was convicted of larceny from a boat in the daytime. Affirmed.

James P. Devereaux, Prosecuting Attorney, and *B. J. Vincent,* Assistant Prosecuting Attorney, for the people.

Gallup, Rogner & Gallup, for respondent.

MCALVAY, J. Respondent was convicted and sentenced in the circuit court for the county of Saginaw upon an information under section 11550, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14596), charging him with larceny of a spark coil from a boat in the daytime.

The record shows the following material facts: The boat containing the spark coil which is claimed

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to have been stolen was, on a certain Saturday afternoon in April, 1912, left by its owner in a boathouse on the Saginaw river in the city of Saginaw, which boathouse was securely locked and fastened, between the hours of 4 and 4:30 o'clock, while it was yet daylight. Upon the following morning the owner went to this boathouse between 8 and 8:30 and found the door on the land side broken open and the doors on the end toward the river, which had been securely fastened by a wooden bar, unfastened and wide open. The engine in the boat had been partially dismantled by the use of tools which were kept by the owner in a tool chest in the boathouse, and the spark coil, which was securely fastened by screws to the side of the boat, had been disconnected and taken away. Afterward this spark coil was found by the owner under a canvas in the boat of respondent in or near the same slip, and on the other side of the property from the boathouse from which it was stolen. The owner called a policeman at once, and while they were taking the property from respondent's boat he appeared and after some conversation in regard to the spark coil he was arrested and taken to the police station where complaint was made in the case and a warrant was issued against him. The trial of respondent followed with the result already stated.

Upon a writ of error he brings the case to this court for review upon errors assigned, which he insists require a reversal. The errors assigned may be grouped and discussed under three heads:

(1) As to the time of the commission of the offense.
(2) As to the cross-examination of the defendant.
(3) As to the argument of prosecutor.

1. The first contention of respondent is that there was no evidence in the case to support the charge in the information that the spark coil was taken during the daytime. It will not be necessary to give an

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abstract of the testimony bearing upon this proposition. The question was submitted to the jury under a careful charge, and the jury found against the contention of respondent. It was a question of fact, and not one to be determined by the trial court as a question of law. The location of this boathouse appears from the record to have been some distance from houses which were occupied and all its doors were found open. This and other evidence in the record support the finding of the jury that the breaking in and stealing occurred during the period legally known as daytime. *People* v. *Taylor,* 93 Mich. 638 (53 N. W. 777); *People* v. *Tracy,* 121 Mich. 318 (80 N. W. 21); *People* v. *Dupree,* 98 Mich. 26 (56 N. W. 1046).

2. The respondent was sworn as a witness in his own behalf and upon cross-examination was questioned relative to his associations and character and also as to offenses committed after the offense charged. The rule that one who offers himself as a witness in his own behalf in a criminal case may, upon these matters, be cross-examined with the same latitude as other witnesses, within the discretion of the court, has been declared by this court. *People* v. *Bryan,* 170 Mich. 683 (136 N. W. 1120), and cases cited.

3. We have examined the assignments of error relative to the argument of the prosecutor, and find that the record does not show that the attention of the court was called to the objectionable argument, or that an opportunity was given the court to pass upon the objections made. We have repeatedly held in recent decisions that this must appear from the record. Therefore, in the instant case, the question is not before the court.

The conviction and judgment are affirmed.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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KINNANE *v.* AUDITOR GENERAL.

MANDAMUS—INDUSTRIAL ACCIDENT BOARD—STATUTES—APPROPRIATIONS—EXPENSES.

The appropriation of $25,000 for an industrial accident board, by Act No. 10, Extra Session 1912, was intended as a limitation upon the entire expenses of the department, including rent, stationery, printing, and salaries, and the auditor general will not be compelled, by mandamus, to charge to the general fund of the State expenses of equipment, rent, etc.: it was the clear purpose of the legislature to limit the expenditures of the board for legal purposes to the sum appropriated. Const. art. 10, § 16.

Mandamus by John E. Kinnane, James A. Kennedy, and Ora E. Reaves, members of the industrial accident board, to compel Oramel B. Fuller, auditor general, to allow and pay expenses of said board out of the general fund of the State, and to cease charging such expenses to the appropriation of $25,000 made by the legislature of 1912. Submitted June 18, 1913. (Calendar No. 25,749.) Writ denied July 9, 1913.

John E. Kinnane, in pro. per., for relators.

Grant Fellows, Attorney General, for respondent.

BROOKE, J. This is an application by relators for a writ of mandamus against respondent—

"Directing and commanding him to remove the limitation of $25,000 aforesaid to the expenses and cost of maintenance and operation of the industrial accident department of the State of Michigan, and to charge such expenses to the general fund of the State; or, in case the court should find that such limitation was proper, commanding said auditor general to charge to the general fund of the State the cost and expense for the rent of the offices of said industrial

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accident board, the furnishing and equipping of same, and the supplies therefor, and to deduct said last mentioned items from the amounts now charged against said $25,000."

The title of the act (Act No. 10, Pub. Acts 1912, Extra Session) under which the board, of which relators are members, was created, is as follows:

"An act to promote the welfare of the people of this State, relating to the liability of employers for injuries or death sustained by their employees, providing compensation for the accidental injury to or death of employees and methods for the payment of the same, establishing an industrial accident board, defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of this act, and restricting the right to compensation or damages in such cases to such as are provided by this act."

Section 7, pt. 6, of the act provides:

"To carry out the provisions of this act there is hereby appropriated for the expenses of the industrial accident board for the fiscal year ending June thirtieth, nineteen hundred thirteen and annually thereafter, the sum of twenty-five thousand dollars. The auditor general shall add to and incorporate into the State tax the sum of twenty-five thousand dollars annually, which said sum shall be included in the State taxes apportioned by the auditor general on all taxable property of the State, to be levied, assessed and collected as other State taxes, and when so assessed and collected to be paid into the general fund to reimburse said fund for the appropriation made by this act."

The act went into effect on September 1, 1912, so that relators had under its terms the sum of $25,000 for the first 10 months of operation. The petition avers that early in September, 1912, it became apparent to relators that an expenditure beyond that sum would be necessary before July 1, 1913. There being no available offices in the capitol, rooms were rented

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in a nearby building. The lease was made by the board of State auditors, and the rooms were furnished upon requisition signed by relators or their secretary. The vouchers for these expenditures were duly audited and paid, but were by the respondent charged against the appropriation of $25,000 credited to relators as a board. It was early contended by relators that, in charging against the fund the cost of rent and furniture, respondent had not properly interpreted the law. Being dissatisfied with respondent's interpretation, relators sought, and on October 9, 1912, obtained, an opinion from the attorney general upon the question. That official held that all expenses of the board, including offices, office fixtures, stationery, and printing, were properly chargeable to the appropriation of $25,000.

The legislature met in regular session on January 1, 1913, and though the relators secured the passage of an amendment to the act whereby the annual appropriation was increased from $25,000 to $40,000, commencing July 1, 1913, no attempt seems to have been made to secure a deficiency appropriation to cover the first 10 months of operation, though, as set out in paragraph 6 of relators' petition, it was in September, 1912, known to them that "it would not be possible to carry on the work of the board within the limits of $25,000 a year."

Relators base their right to relief upon the language of section 2, pt. 3, of the act which follows:

"The board shall be provided with an office in the capitol, or in some other suitable building in the city of Lansing, in which its records shall be kept, and it shall also be provided with necessary office furniture, stationery and other supplies. It shall provide itself with a seal for the authentication of its orders, awards and proceedings, upon which shall be inscribed the words 'Industrial Accident Board—Michigan—Seal.' It shall employ such assistants and clerical help as it may deem necessary and fix the compensation of all

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persons so employed: *Provided,* that the average compensation paid to such employees shall not exceed one thousand dollars *per annum* for each person employed, and all such clerical assistants shall be subject to existing laws regulating the grading and compensation of department clerks. The members of the board and its assistants shall be entitled to receive from the State their actual and necessary expenses while traveling on the business of the board; but such expenses shall be sworn to by the person who incurred the same, and be approved by the chairman of the board before payment is made.

"All such salaries and expenses when audited and allowed by the board of State auditors, shall be paid by the State treasurer out of the general fund, upon warrant of the auditor general."

It is their contention that by the use of the foregoing language the legislature intended to make and did make an appropriation covering the cost of rent, necessary office furniture, stationery, and other supplies, said appropriation being outside of and in addition to the $25,000 provided for in section 7, pt. 6, quoted *supra.* Such a construction is, in our opinion, clearly unwarranted. Relators' petition shows that the rent for their offices amounts to $1,200 per annum, that they have expended for furniture some $3,000, and that the cost of stationery and printing is about $3,500 per annum. It is scarcely conceivable that the legislature intended to add to the sum specifically provided this additional amount, an amount more than 25 per cent. in excess of the appropriation itself.

The Constitution (article 10, § 16) provides:

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law."

It is undoubtedly true as stated by relators that no particular form of language is necessary to constitute an appropriation. The cases cited to this proposition by relators are doubtless good law, but they have no application to the case under consideration. Here the

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legislature has not spoken by indirection, but has very specifically defined the *amount* appropriated and the *purposes* to which the appropriation is to be devoted. The amount is $25,000 and the purpose is *"to carry out the provisions of this act."* If any doubt were possible, it is at once dispelled by reading the closing sentence of section 7, pt. 6:

"The auditor general shall add to and incorporate into the State tax the sum of twenty-five thousand dollars annually, which said sum shall be included in the State taxes apportioned by the auditor general on all taxable property of the State, to be levied, assessed and collected as other State taxes, and when so assessed and collected to be paid into the general fund to reimburse said fund for the appropriation made by this act."

The act provides that all payments shall be made from the general fund, and that fund is to be reimbursed by the levy, collection, and payment into it of $25,000. To reimburse it for what? *"For the appropriation made by this act."* If relators' contention is sound, the tax levied and paid into the fund would only partially reimburse it. We think it entirely clear that the legislature sought to and by appropriate language did limit the expenditure which relators, as a board, could make for any legal purpose to the sum of $25,000.

The contention of relators that the sum appropriated was for *"expenses"* as distinguished from *"salaries"* is wholly untenable. While no particular words are essential in making an appropriation, the will of the law-makng body must be clear and apparent. Nothing should be taken by intendment when, as in the case at bar, the legislature has in apt terms covered the question.

The writ is denied.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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KEEL v. WILSON FRUIT JUICE CO.

1. EVIDENCE — OFFICER OF CORPORATION — CROSS-EXAMINATION — BOOKS OF ACCOUNT.
   In assumpsit for a balance of salary due, it was proper cross-examination to inquire of the president of defendant corporation concerning the correctness of defendant's books, from which the witness had taken a statement used by him on the stand: plaintiff was entitled to a full cross-examination as to material matters. No error was committed in refusing to strike from the evidence the statement so used by the witness and his testimony relative to the balance shown by the books of defendant.

2. SAME—BOOKS—PREJUDICIAL ERROR.
   No prejudicial error was committed by introducing in evidence plaintiff's book showing amounts received by him, admitted by defendant's books to be correct, with the exception that a larger amount was credited by plaintiff to defendant than its own books disclosed; any possible error in the reception of this evidence favored rather than prejudiced defendant.

3. SAME—NEW TRIAL.
   Held, that the evidence was sufficient to sustain the verdict in plaintiff's favor.

Error to Van Buren; Des Voignes, J. Submitted June 11, 1913. (Docket No. 66.) Decided July 9, 1913.

Assumpsit by Bert Keel against the Wilson Fruit Juice Company for services performed. Judgment for plaintiff. Defendant brings error. Affirmed.

Boudeman, Adams & Weston, for appellant.

Glenn E. Warner, for appellee.

MCALVAY, J. Plaintiff brought suit against de-

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fendant to recover a balance claimed by him to be due for wages earned while in the employment of defendant at its plant at Lawton, Van Buren county, under a contract and agreement between the parties at a certain stated salary. He was employed as an experienced jelly and vinegar maker, and began work February 1, 1910. He recovered judgment on the verdict of the jury for $260.41, the amount claimed by him. Defendant upon a writ of error brings the case here for review.

The facts of the case are as follows: Plaintiff first entered this employment and worked under the superintendence of defendant's manager from February 1, 1910, until January 31, 1911, upon a proposition submitted to him in writing by defendant's president and accepted by plaintiff, at $125 per month, and continued under this contract until June 1, 1911, when another agreement was made between the parties, whereby plaintiff continued to work until February 20, 1912, at $15 per week. The foregoing facts are not in dispute.

Defendant, under its notice with the plea of the general issue, and upon the trial, claimed recoupment. On account of the careless, unskillful, and improper manner in which plaintiff performed his work in the manufacture of vinegar, it sustained damage on 67 barrels of vinegar at 18 cents a gallon and 12 cases of vinegar at 50 cents a gallon, making altogether $1,510.46. Upon this claim of recoupment the dispute in this case arose. Defendant upon the trial offered evidence claimed in support of its contention. The contention of plaintiff was that this vinegar for which defendant seeks damages was manufactured at this plant under and by the express orders, both written and oral, of the defendant through its president, out of a large quantity of old, stale, spoiled grape juice and other materials, which for a long time before

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plaintiff entered the employ of defendant had accumulated at said plant, and which was stored in numerous barrels and casks in its cellars; that it was impossible to manufacture standard vinegar out of such materials, and that during the whole time such manufacture was under the control of the manager at Lawton and the president and other officers of defendant in Chicago, and that the vinegar made from this material was sent to Chicago for chemical tests by defendant's chemists and was so tested; that during the whole time plaintiff worked for defendant no complaint or charge was made to him or to his knowledge that his work was not properly and satisfactorily performed.

The errors assigned and relied upon by appellant are in relation to the admission of evidence and the refusal of the court to grant a new trial.

While the president of the defendant company was being examined on the part of plaintiff, under the statute, he produced and used a statement taken for him from defendant company's books in Chicago. This was objected to by defendant, and a motion was made to strike out his entire testimony in regard to such balance, for the reason that it did not correspond with plaintiff's bill of particulars. The court denied this motion, and error is assigned upon such denial. There is no difference between the accounts of these parties as to the balance which remained unpaid to plaintiff for his services, except that defendant's statement was $20 greater than plaintiff claimed, which was accounted for by the fact that plaintiff had received several items which did not appear upon the books at the Chicago office. The plaintiff was entitled to cross-examine this witness at length as to all matters material to the issue. The witness testified that he had no reason to doubt the correctness of the books, and this statement, which was introduced in evidence

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by plaintiff, was material as showing an admission on the part of defendant. The court properly denied the motion.

The next error assigned relates to the testimony of plaintiff, who was examined relative to a book in which he had made entries, and who stated it was in his handwriting and a correct statement of the moneys received from defendant. Page 48 of this book was offered in evidence, showing this account. It was objected to as not properly identified as a book of account. Error is assigned upon its reception in evidence. It was of no prejudice to defendant, for the reason that all of these payments had been admitted, as appears from the statement of this account taken from defendant's books already in evidence. It was corroboratory of what defendant admitted.

The fourth, fifth, and sixth assignments of error relate to the testimony of plaintiff in regard to his account as kept in his book. This examination was objected to on the same ground; that the book was not competent evidence. In this testimony and in this memorandum of account no claim was made by plaintiff for any credit which had not already appeared by the testimony furnished by defendant, and plaintiff's account credited the defendant with $20 not charged against him. As already stated, this was not prejudicial to defendant, but on the contrary was in its favor.

Defendant's motion for a new trial was based on the ground that the verdict was against the weight of the evidence. The record is a brief one, and our examination of it satisfies us that there is abundant evidence to support the verdict, and that the court was not in error in denying the motion. The case was submitted to the jury under a charge of which no complaint whatever is made by defendant, and the verdict

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of the jury, as already stated, was justified by the evidence.

We find no prejudicial error in the case.

The judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

WOJNOWSKI *v.* COMMON COUNCIL OF CITY OF DETROIT.

INTOXICATING LIQUORS—MANDAMUS—APPROVAL OF LICENSE.

Upon relator's petition for mandamus to compel the Detroit common council to grant his application for a retail liquor license, without any showing as to the number of licenses which might be lawfully granted, or which had been issued, being also silent as to any vacancy in the number granted, the prayer of the petition, that asked for a peremptory writ without giving respondents a hearing, was properly denied.

Certiorari to Wayne; Van Zile, J. Submitted June 10, 1913. (Calendar No. 25,731.) Writ denied July 9, 1913.

Mandamus by Czeslaw Wojnowski against the common council of the city of Detroit to require respondents to approve an application for a retail liquor license. The circuit court denied the petition: relator brings certiorari. Affirmed.

Proctor K. Owens, for relator.

William E. Tarsney (Richard I. Lawson, of counsel), for respondents.

MOORE, J. The relator filed his petition in the circuit court for the county of Wayne, praying a per-

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emptory writ of mandamus to compel the respondents to reconvene and approve an application for a retail liquor license filed prior to the 15th day of April, A. D. 1913. The circuit court to whom the petition was presented declined to issue the writ. The relator petitioned this court for a writ of certiorari for the purpose of reviewing the action of the circuit court.

The circuit judge has filed his return, in which appears the following:

"(1) The petition of the relator herein was insufficient in my judgment to justify me in issuing a peremptory writ of mandamus as therein prayed, because said petition did not set up or allege the number of licenses that the common council of the city of Detroit were permitted to grant to applicants under Act No. 291 of the Public Acts of 1909, as amended.

"(2) Because said petition did not show that the maximum number of licenses which might be granted were not granted in accordance with Act No. 291 of the Public Acts of 1909, as amended."

"(4) Because said petition of relator does not set up or allege that there is a vacancy in the maximum number of licenses that the common council is empowered to grant under Act No. 291 of the Public Acts of 1909, as amended."

"(6) Because said relator's petition, failing as it does to set forth or allege the matters specifically above enumerated, was not sufficient to confer jurisdiction upon the circuit court for the county of Wayne and to require it to issue the peremptory writ of mandamus as in the petition prayed. Therefore, in the exercise of my discretion, the application for a peremptory writ of mandamus was denied, inasmuch as the prayer of the petition required the court to issue a peremptory writ of mandamus without giving the respondents an opportunity to be heard."

An examination of the petition shows these statements in the return are true.

The order of the circuit court is affirmed, with costs.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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PATOW v. VILLAGE OF OAKWOOD

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—NEGLIGENCE.

A village is not liable for injuries caused plaintiff by driving across a filled trench, which had recently been opened to lay a water main, and which had been softened by a heavy rain, so that his vehicle sank down in crossing, being outside the 30-foot traveled roadbed and not at an intersection of a street, since reasonable safety for ordinary use is all that can be required of a municipal corporation in caring for the streets.[1]

Error to Wayne; Hally, J. Submitted June 16, 1913. (Docket No. 91.) Decided July 9, 1913.

Case by William Patow against the village of Oakwood and the board of water commissioners of the city of Detroit for personal injuries. Plaintiff discontinued as to the last named defendant. Judgment for defendant village of Oakwood on a directed verdict. Plaintiff brings error. Affirmed.

Ignatius J. Salliotte, for appellant.

Hearn, Sherman & Chapman, for appellee.

MOORE, J. This is a personal injury case. It was voluntarily discontinued as against the board of water commissioners. From a directed verdict in favor of the other defendant, the case is brought here by writ of error.

The facts are not in dispute. The plaintiff is a market gardener about 50 years old. He had lived in Ecorse about 44 years. The village of Oakwood has

[1] The authorities on the general question of the liability of a municipal corporation for defects or obstructions in streets are discussed in an extensive note in 20 L. R. A. (N. S.) 513.

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about 1,000 people. The plaintiff was accustomed to going to the city of Detroit by way of a street in the village known as the Fort street boulevard. This was an unpaved street. On the 14th of August, 1911, he was returning from Detroit with a loaded wagon. We quote from the testimony of the plaintiff:

"I drove back home with this manure as far as Oakwood and a shower caught me there. It looked bad and I thought I would drive in for shelter. It was about 2 o'clock in the afternoon. I drove under the covered scale of Rennie's coal yard. The roadbed there is about 33 feet in width.

"*Q.* Did you know that they had been laying water mains there?

"*A.* I seen that they laid water mains; that is, seen them digging the trench, but it was all filled up when I came along there, all smoothed over. There was no sign of there being danger there. Fort street boulevard runs east and west. The water main trench was located about 5 feet from the ditch. It was on the south side of the traveled highway.

"*Q.* Was the space that the trench occupied a part of the traveled highway?

"*A.* No, sir.

"*Q.* Question repeated.

"*A.* It was in the traveled highway. It was 5 feet from the ditch—the trench—in the highway, not the roadbed. The roadbed in that place is about 30 feet wide."

It is shown that where he entered the coal yard cinders had been thrown into the trench to make it safe. The plaintiff testified:

"*A.* Yes. When I got up at this portion I kind of hurried up here and turned in something like that [illustrating] to go under the shed to get in out of the rain. It rained pretty hard. It poured a little while.

"*Q.* It was an extraordinarily heavy rain?

"*A.* Yes. I was in there from 25 to 30 minutes. The rain came down heavy. When the rain was over I drove on through the shed and around this way. I

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came right around the office, which was right in here."

The plaintiff did not leave the coal yard the same way in which he entered. He says it was not practicable for him to do so. He attempted to drive across the trench "a little kitty-cornered." The hind feet of one of the horses sank into the trench, the team sprang forward, and as one, or perhaps both, of the front wheels dropped into the soft earth of the trench, the plaintiff was thrown from the spring seat on which he sat and was hurt.

We have, then, an unpaved street in a country village, with a roadway 30 or more feet wide, outside of which a water main had been recently laid. The earth had been returned by hand. Whether it had been tamped or not does not appear, but the trench had been filled so that it was rounded. This was followed by a heavy rain. The plaintiff saw the situation and attempted to cross the trench, not at a street intersection, with the result already indicated.

The language of MCGRATH, J., in *Westfall* v. *Board of Water Com'rs*, 93 Mich. 210 (53 N. W. 161), is applicable to this case. He said:

"A ridge near the traveled way can be no more dangerous than a ditch, or a barrier of the same height. * * * There are necessary uses to which highways are devoted other than travel. Water, gas, and other pipes are usually laid within the highway and between the curbs and ditches. * * * It is a matter of common knowledge that, in laying pipes in unpaved streets and highways, the filling is done just as it was done in this instance. The earth is rarely tramped down, except where the street is paved or the excavation crosses the street. To require it in every instance would add largely to the expense.

"Streets should be kept reasonably safe for ordinary uses, not absolutely safe against extraordinary contingencies. Some consideration must be had for

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the other necessary uses to which highways are devoted."

See, also, *O'Rourke* v. *City of Monroe*, 98 Mich. 520 (57 N. W. 738).

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred

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EISENBACH *v.* EISENBACH.

1. DIVORCE—DISMISSAL OF BILL—DECREE.
   Notwithstanding the filing of an answer in the nature of a cross-bill, in a suit for divorce, the complainant is entitled to dismiss the proceedings without prejudice at any time before interlocutory or final decree, unless some legal interest of defendant or the State precludes.
2. SAME—INTERLOCUTORY ORDERS AND DECREES.
   Neither an order restraining defendant husband from incumbering or selling his property pending suit for divorce, nor an order for the payment of temporary alimony, so affects the merits of the controversy as to deprive complainant of her right to dismiss.
3. SAME.
   Complainant was entitled to dismiss her bill for divorce after the hearing and before a final decree had been entered, her counsel having asked for and obtained further time to secure additional testimony, and the time having expired without complainant taking any steps to introduce the additional proof.

Appeal from Mecosta; Barton, J. Submitted June 3, 1913. (Docket No. 17.) Decided July 9, 1913.

Bill by Amy Eisenbach against Martin Eisenbach for divorce. From a decree dismissing the bill, complainant appeals. Reversed.

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W. D. Fast, for complainant.

Broomfield & Worcester, for defendant.

BIRD, J. On April 5, 1911, complainant filed her bill of complaint in the Mecosta circuit court charging defendant with extreme cruelty and praying for a decree of divorce, alimony, and the custody of their four children. The defendant filed an answer in the nature of a cross-bill in which he denied complainant's charges and charged her with extreme cruelty, with a prayer for relief. The case came on for hearing in February, 1912, and, after the testimony was closed and the case argued, complainant's counsel asked for further time in which to secure the depositions of certain nonresident witnesses. The application was granted and complainant was given 73 days, or until the first day of the May term, in which to secure the same. On the adjourned day the matter came on for hearing again, at which time the complainant asked for 30 days' further time in which to secure said deposition; for some reason which the record does not disclose, they had not been secured during the adjournment. This application was opposed by defendant and denied by the court. Thereupon complainant asked leave of the court to dismiss her bill without prejudice. The court refused to grant the request and rendered a decree therein, dismissing both bill and cross-bill. From this decree the complainant has appealed.

But one complaint is made by her on this appeal, and that is the refusal of the court to permit her to withdraw her bill of complaint without prejudice. It is argued in her behalf that she had a legal right to discontinue her case any time before final decree.

This precise question appears to have been considered and determined in the case of *Coon* v. *Coon,* 163 Mich. 644 (129 N. W. 12). In that case Mr.

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Justice BLAIR reviewed the authorities at considerable length and as a result of it stated the rule to be as follows:

"We think the general rule to be deduced from the authorities is that in divorce proceedings the complaining party may dismiss his suit at any time before interlocutory or final decree, in the absence of any legal interest on the part of the defendant or of the State to the contrary."

If we apply this rule to the case made by this record, it at once becomes apparent that complainant was entitled to the order which she asked.

It is, however, argued by the defendant that the two orders made by the chancellor, namely, one for an injunction and the other for temporary alimony, were interlocutory decrees, and that complainant was thereby deprived of her right to dismiss her case as a matter of course. The interlocutory decree, which deprives a complainant of the right to dismiss his bill as of course, must be such an order or decree as affects the merits of the controversy. 16 Cyc. p. 461. The order for an injunction was made to prevent defendant from selling or incumbering his property until the merits of the case could be heard, and the order for temporary alimony was made to furnish complainant with support and with means to get the merits of her case before the court. It cannot be said that these orders were a partial adjudication on the merits of the controversy. We are of the opinion that no interest of the defendant nor of the State will be injuriously affected by allowing complainant to dismiss her suit without prejudice.

The decree will be reversed, and such an order will be entered in the trial court. The complainant will recover her costs in this court.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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DETROIT RIVER TRANSIT CO. *v.* ALDRICH.

1. PLEADING—BREACH OF CONTRACT—COMMON COUNTS.
   Damages for breach of contract are not recoverable under the common counts.

2. SAME—DEFENSES, NOTICE OF—RECOUPMENT—PLEA.
   In giving special notice of defense for breach of an alleged contract, defendant must set up the terms of the contract as in a declaration: it is insufficient to refer to plaintiff's declaration on the common counts by an averment that "plaintiff failed and neglected to perform the contract upon which this suit is brought," etc., since no special contract is alleged in the declaration.

3. CONTRACTS—BREACH—DEMAND.
   Where no opportunity was afforded by defendant to plaintiff to fulfill a contract to deliver gravel which defendant claimed plaintiff failed to perform, and defendant made no demand for performance, he was not entitled to recoup damages for an alleged breach, in an action for a balance remaining unpaid under the agreement.

4. SAME—VOLUNTARY PAYMENT—BONUS.
   Nor could defendant recover a voluntary payment made to one of plaintiff's employees as a gratuity or bonus for expediting the delivery of the gravel.

5. EVIDENCE—CONCLUSIONS—AGREEMENT.
   Where the issue between the parties related to the amount to be paid for a quantity of gravel, and plaintiff's agent had testified at considerable length with reference to a conversation with defendant, in which the latter wanted plaintiff to furnish the gravel at 45 cents a yard, and plaintiff's agent refused to do so, the witness afterwards stating that he remembered defendant agreed to pay 50 cents a yard, there was no error in refusing to strike out the testimony of the witness as a conclusion.

6. SAME—VALUE.
   Evidence of dealings with other parties by plaintiff, and the price paid by them at different times and under different conditions from those existing at the execution of the contract, was not erroneously excluded.

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Error to Wayne; Codd, J. Submitted June 5, 1913. (Docket No. 33.) Decided July 9, 1913.

Assumpsit by the Detroit River Transit Company against Byron S. Aldrich for gravel sold and delivered to defendant. Judgment for plaintiff. Defendant brings error. Affirmed.

James Swan, for appellant.

Anderson & Wilcox, for appellee.

STEERE, C. J. This is an action in assumpsit, in which plaintiff recovered against defendant, in the circuit court of Wayne county, on May 25, 1911, a judgment in the sum of $580.59, being a balance claimed due on a quantity of gravel sold and delivered to defendant. Plaintiff declared on the common counts in assumpsit, serving a bill of particulars, showing amounts, date of delivery, and price of a quantity of gravel furnished defendant, amounting to $5,984.60 and payments credited on same amounting to $5,429.08, leaving a balance in plaintiff's favor of $555.52. Defendant pleaded the general issue with notice of set-off and recoupment, claiming a balance due him for overpayments on their general account of $179, and also a further sum of $1,177 damages for failure to deliver, according to contract, 2,354 yards of gravel, serving a bill of particulars which showed payments to plaintiff of $5,466.01 and credits for gravel delivered amounting to $5,286.40. The case was tried before a jury in the circuit court, resulting in a verdict in favor of plaintiff as stated, and defendant has removed the proceedings to this court under various assignments of error as to the admission and rejection of testimony and charge of the court. At the time of the dealings between these parties which resulted in this litigation, plaintiff, a Michigan corporation, was the owner of certain boats

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carrying gravel from the "Middle Grounds" at Port Huron, and in that connection was generally engaged in transporting and selling gravel, sand and coal in and around Detroit, its active man in control, and manager, being a Mr. Beecher. Defendant was a supply contractor, also engaged in the sand and gravel business in the city of Detroit. In the summer of 1909 some improvements were being made in connection with the Detroit waterworks, in which bids were to be received for a quantity of gravel. Beecher and defendant both contemplated bidding on the same, and for mutual protection, each against the other, and both against possible outside competitors, they agreed that Beecher should put in a bid of 57 cents per yard and defendant Aldrich a bid of 55 cents per yard, and, if defendant got the contract, plaintiff was to deliver the gravel at the waterworks. Aldrich testified that after this amicable adjustment he became suspicious Beecher was going to "double-cross" him, and as a precaution against such perfidy put in a bid at 54 cents. When the bids were opened, it was found Beecher had bid 55 cents and Aldrich had gone him one cent better, or worse, as the case may be, and secured the contract. Negotiations were then entered into for further co-operation, which resulted in an oral agreement, the terms of which are in dispute. Prior to this, during the same summer, plaintiff had sold defendant several boat loads of gravel, to be delivered on the Detroit river at the Solvay dock at 45 cents per yard.

Defendant testified that he and Beecher discussed the amount required to fill the contract, the specifications calling for 11,000 yards with option for an additional 15 per cent., and it was agreed that plaintiff should deliver the same at 45 cents per yard; that the first load was delivered September 28th, and between that time and the 1st day of November only four loads

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had been delivered; that the waterworks people were "hounding" him for faster deliveries, and he complained to Beecher about it, who assured him there need be no worry, as it would all be put in on time. Following this, owing to plaintiff's delay in delivery, defendant procured two boat loads of gravel from other parties, and when Beecher ascertained this he protested, requesting defendant not to get any more gravel from other parties, stating he had agreed to fill this contract, and guaranteed he would do so; but at the close of navigation there was a shortage on the contract of 2,354 yards. Defendant also testified that Beecher was ignorant of the management of boats of that character, and, owing to mismanagement and delays, defendant interviewed a man named Hickey who was a member of the crew of one of plaintiff's boats, and promised him that, if the work was done as it should be, he would personally pay him $25 extra, as a result of which the boat was handled in a better manner and he paid Hickey as promised; that in talking with Beecher afterwards about the better work being done defendant told him the reason why, and said that he thought Beecher should reimburse him. To the question, "What did he say?" defendant answered: "I don't remember just what he said. I can't swear that he said that he would."

Beecher testified that it was more difficult and expensive to deliver gravel at the waterworks than at the Solvay dock, and he positively refused to deliver any gravel to the waterworks at 45 cents a yard as defendant wished him to do, but asked 50 cents per yard; that he refused to undertake to deliver any definite amount even at that price, stating as the reason that he had other customers to supply, but, if defendant wished, he would deliver for defendant on his contract with the waterworks all that plaintiff was able to at 50 cents per yard, to which defendant finally agreed.

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The record shows that plaintiff commenced delivering on September 29, 1909, and made the last delivery on December 7, 1909. At the end of each month duplicate invoices were rendered defendant, showing date and number of yards of gravel delivered, and price per yard. Defendant paid on the accounts from time to time, making no objection to the invoice price. He testified that during this time, and when making such payments, he did not notice the price per yard stated in the invoices, and had no knowledge that plaintiff was claiming more than the 45 cents per yard. Nine thousand four hundred and sixty-five yards of gravel were delivered at the waterworks by plaintiff. On December 7th Detroit river froze over, and navigation closed. Defendant paid $3,711.40 on this account prior to the close of navigation and $1,717.68 later. After the close of navigation, defendant received a notice from the board of water commissioners that 15 per cent. increase in the amount of gravel was desired; the contract giving the board that option. Defendant did not communicate this fact to plaintiff, or request him to make additional deliveries after receiving this notice.

The issues presented by the pleadings and testimony were: The price of the gravel, whether 50 cents or 45 cents per yard; whether defendant had received 82 yards less gravel than plaintiff claimed in deliveries of September 6th and 23d, and had not received a claimed shipment of October 28th, amounting to 429 yards; some small items in regard to screening gravel, phone charges, etc., and the $25 paid to Hickey; also defendant's claim of recoupment for breach of contract sued upon by reason of plaintiff's failure to deliver an additional 2,354 yards.

On the trial the court took from consideration of the jury the $25 item as being a voluntary payment, or bonus, to an employee, made by defendant, for

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which plaintiff had in no way become responsible, and defendant's claim of recoupment for failure to deliver additional gravel, instructing the jury as follows:

"There is also in this case a claim on the part of the defendant for damages by reason of the alleged breach of the contract on the theory that in September of that year the plaintiff in this case agreed to deliver all gravel needed at the waterworks dock. In that connection I charge you that there is no testimony in the case, even if there was such a contract, as to the breach thereof. There is no testimony in this case showing any demand made upon the plaintiff for the performance of the balance of that contract, and no opportunity given to him to furnish whatever may have been necessary under said contract, if there were such a contract. Therefore, in view of the fact that there has been no demand and no opportunity given to the plaintiff to fulfill such a contract, if there was one, there can be no recovery for such and you will eliminate it from your consideration."

Whether or not there was a contract to deliver any specific amount of gravel would be an issue of fact for the jury if properly presented by the pleadings, inasmuch as defendant testified that plaintiff agreed to furnish the full amount required by the waterworks contract, and Beecher positively denied it. Plaintiff does not declare expressly upon any contract. Its declaration is only on the common counts, and contains no special count for breach of a contract. Its bill of particulars is for a quantity of gravel sold and delivered at a certain price per yard. It could not recover damages for a breach of contract under the common counts. *Hamilton* v. *Frothingham,* 59 Mich. 253 (26 N. W. 486). Defendant's plea is the general issue with notice, so far as this question is involved, that—

"Plaintiff neglected and failed to perform its part of the contract upon which this suit is brought by failure to deliver 2,354 yards of gravel as it was re-

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quired to do to complete the contract made and entered into between the parties hereto, and that by reason of the failure to perform said contract in full the said defendant suffered a loss," etc.

Recoupment is, in its nature, a cross-action for damages, an affirmative defense in relation to which the defendant is, in effect, plaintiff and may recover a money verdict in his favor if his claim exceeds plaintiff's demand. Such claim must be properly pleaded, as in a declaration. Were the contract under which recoupment is claimed pleaded in plaintiff's declaration, defendant might make it a part of his plea, or special notice, by apt reference, but here defendant refers to "the contract upon which this suit is brought" when none is pleaded by plaintiff, and fails to set out and properly describe in his notice the special contract upon which he relies. Defendant is relying upon a contract which plaintiff not only does not plead, but in fact denies. Though it need not be as formal as a declaration, it ought, nevertheless, to be equally specific. *Bolt* v. *Friederick,* 56 Mich. 20 (22 N. W. 187); *Watkins* v. *Ford,* 69 Mich. 357 (37 N. W. 300); *Delaware & Hudson Canal Co.* v. *Roberts,* 72 Mich. 49 (40 N. W. 53). A plea or notice which sets up a breach of contract in support of a claim of recoupment should be as distinct and unambiguous as if suing directly for breach of contract.

Aside from this infirmity, defendant's evidence does not sustain his claim of breach. He admitted that up to the close of navigation what gravel the water board wanted was delivered by plaintiff.

"*Q.* So, when the last load of gravel was delivered on December 7th, so far as you knew at the time that is all the gravel they wanted?"

"*A.* Yes; I think so, I think you are right about that."

Later he received notice that an additional 15 per

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cent. was desired. He made no further demand on plaintiff for more gravel. His reason is that it would do no good, for plaintiff had sold its boats, and could not furnish it. Beecher testified plaintiff had boats in 1910, but, be that as it may, the court correctly stated "there was no demand and no opportunity given to the plaintiff to fulfill such contract, if there was one." There was no error in the charge of the court upon that subject.

This view disposes of defendant's third assignment of error, which relates to the rejection of certain testimony claimed to have bearing upon the measure of damages under his notice of recoupment.

The court was also correct in instructing the jury that there was no legal obligation resting upon plaintiff to reimburse defendant for the $25 paid Hickey. It was a voluntary payment made by defendant to one of plaintiff's employees, without plaintiff's knowledge or consent, to advance work in which defendant was interested and primarily for his own interest. There is no testimony that Beecher, when informed of it, agreed for plaintiff to pay it, and defendant himself says, "I can't swear that he said he would." No legal liability was established, and the court properly withdrew the item from the consideration of the jury.

The three remaining assignments of error discussed in defendant's brief relate to the admission and rejection of testimony. Witness Beecher was asked by plaintiff's counsel "whether or not Mr. Aldrich agreed to pay you 50 cents for the gravel," and answered, "I am quite certain he did." The answer was stricken out on motion of defendant's counsel, and witness was then asked, "*Q.* Do you know whether or not he did?" to which witness answered, against the objection that it was calling for a conclusion, "Yes," afterwards stating, "I remember distinctly that he agreed to pay 50 cents." This is but a fragment of the extended

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testimony of this witness upon that subject. The facts were gone into fully by both parties relative to their conversations, disputes, understanding, and agreement as to price, and each was fully cross-examined. Beecher testified positively that defendant wanted him to furnish gravel for the waterworks at 45 cents. He refused positively, stated it was in the fall, and demands were large; that he could get 50 cents, and, if he furnished defendant any, it must be at that price, and defendant then said, "Go ahead." In view of his testimony on the subject, taken as a whole, we see no force in the contention that the answers objected to should be rejected as conclusions.

On cross-examination the court permitted counsel to inquire fully of Beecher as to all his dealings with defendant, including previous sales to him at 45 cents, but sustained objection to going into dealings with other parties as immaterial. Defendant assigns this as error on the ground that it was competent to show the "running price for that season." Both parties claimed a specific agreement as to the price per yard for gravel to be delivered at a certain place towards the close of the season. We do not think the price paid by other parties for gravel delivered at other places competent evidence of what this contract was, or as having sufficient, if any, bearing upon the understanding of the parties to open that field of inquiry. It was shown and conceded that earlier in the season plaintiff had sold defendant himself gravel delivered at another dock for a less price than the contract price claimed by plaintiff for the waterworks delivery.

On cross-examination defendant's counsel asked witness Beecher: "Now, what experience did you have in handling boats like the Shores prior to the purchase by you?" Objection to this as immaterial was sustained, and the ruling is assigned as error. It

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is claimed "this class of testimony was very material to show the incompetence of plaintiff as a reason why delivery to the full amount was not made." This being the purpose, it goes to the question of recoupment, which we have already discussed, and need not be considered further.

We think the court allowed abundant latitude in the examination of witnesses as to the material issues of fact in the case, and submitted such issues to the jury with a very plain, full, and correct charge as to the rules of law involved and the duty of the jury in passing upon the facts.

The judgment is affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

HAUTALA *v.* DOVER.

1. SALES—PRICE—TROVER—CONTRACTS—PAYMENT—EVIDENCE.

In an action for the conversion of an automatic piano, which plaintiff purchased of defendant on the installment plan, claiming to have paid the entire purchase price, which defendant contended included interest and $50 more than plaintiff's testimony tended to show, it was a question for the jury whether plaintiff's contention was true as to the terms of the agreement which, it was undisputed, were modified at the time of delivery of the piano, and the court did not err in submitting it, though there was a writing which evidenced the original transaction.

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2. DAMAGES—VALUE.

The measure of damages, in trover, is the true cash value at the time and place of conversion, in the absence of testimony showing that the goods had a peculiar value to the owner.

3. SAME—VERDICT—VALUE.

Upon defendant's testimony, uncontradicted, that the property converted was worth $300 at the time of conversion, four years after it had been purchased, and after it had had considerable usage, a verdict for $527.80 was without basis, and should have been set aside.

Error to Houghton; O'Brien, J. Submitted June 6, 1913. (Docket No. 42.) Decided July 9, 1913.

Trover by Matt Hautala against Charles Dover for the conversion of an electric automatic piano. Judgment for plaintiff. Defendant brings error. Reversed.

Burritt & Burritt, for appellant.

A. W. Kerr, for appellee.

STEERE, C. J. This is an action of trover in which plaintiff recovered, in the circuit court for the county of Houghton, a verdict and judgment for $527.80 as the value of an automatic piano previously bought by him on contract from defendant, and later taken into possession by defendant under a writ of replevin issued from justice's court, under the claim that there were $50 principal and about $45 interest yet due and unpaid upon the instrument. The replevin suit was dismissed by the justice on November 8, 1911, for want of jurisdiction. The record does not disclose that plaintiff asked any judgment for return of the property replevied, and no such judgment was entered, but on November 15, 1911, he commenced this action in trover.

Plaintiff claims that at the time said property was

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replevied he was absolute owner of the same and had fully paid for it according to his contract of purchase. Defendant claims that there was then due upon the contract the amount already stated, and that at the time of the trial of this suit the sum of $95.47 as a balance of principal and interest was past due and unpaid; that by the terms of said contract the title and right of possession did not vest in the plaintiff until the property was fully paid for. Plaintiff filed the ordinary declaration in trover, describing the property, and claiming damages of $2,000. Defendant pleaded the general issue and gave special notice of a written contract entered into between the parties, claiming thereunder that payments were past due and unpaid thereon, and that he therefore yet held the legal title and right of possession.

It is undisputed that plaintiff bought this piano from defendant, who delivered it to him on December 8, 1908, at plaintiff's saloon in the city of Houghton; that he then and there signed a written contract for the same and made a payment, the amount of which is in dispute, and was then given a receipt by defendant for $120; that he has since made payments and taken receipts therefor, entitling him to a credit on said written contract of $800.

The contract, which was admitted in evidence, is dated December 8, 1908, and is for a purchase of the automatic piano in question at the price of $850, $120 paid down, $30 on December 15th, $40 on January 20th following, and $40 each month thereafter until full payment is made, with interest at the rate of 6 per cent. per annum until paid. Title and right of possession are reserved in Charles Dover, the defendant, until full payment is made. The right is given defendant to retake possession in case of attempt to incumber, dispose of, or remove said piano from the county of Houghton, or if default is made in pay-

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ments as specified, and in such case the moneys already paid are to become stipulated damages for nonfulfillment of the contract, loss in value, and for use or rental while in plaintiff's possession. Plaintiff admits signing this contract, but repudiates it, claiming that he supposed it was a receipt for the piano, which he had previously bought by an oral agreement from defendant's agent for $800, and on which he then paid $20 down, agreeing to pay $25 on delivery and $25 per month thereafter until the $800 was paid, without interest.

The disagreement resulting in this litigation arose over the amount paid and the interest. Plaintiff testified that he paid $100 when delivery was made, the $20 previously paid being added to his receipt to make the $120 for which it was given, and that he agreed to pay $40 per month thereafter. The receipts he produced total $800.

Defendant claimed but $750 had been paid and that $50 was credited as a rebate on the contract price. His explanation is as follows:

"We gave him a discount of $50, and $20 that Mr. Maliniemi had collected. * * * The order was brought in to me for $850, $100 down and $25 a month. When we came to close up the deal with Mr. Hautala, he wanted to get it cheaper, so we finally agreed that if he would pay $40 a month, pay $100 down and $40 a month, I would throw off the $50, and so he said that, but the price of the piano was $850. I had sold 14 of them at that price, and I was bound not to sell for anything less. * * * I haven't any right to sell for anything less than $850. and it had to show on my contract $850."

Defendant was a piano dealer and had been in the business since 1898. He had a store in Hancock and amongst other instruments sold nickel-in-the-slot or automatic, electric pianos, which were new at that

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time and in demand for use in saloons and other public places.

Maliniemi, a Finlander, who acted as his agent amongst Finnish people, took an order from plaintiff, who was a Finnish saloon keeper, for one of these pianos. He testified that the price was $850 and $25 per month until paid for. Plaintiff claims it was $800 without interest; no written order was given. It was reported to defendant by the agent at $850 and $25 per month. Just what the understanding was between plaintiff and the agent is in our view immaterial, because according to the testimony of all parties, including plaintiff himself, there was a readjustment and a different agreement made when the piano was delivered and the deal closed. He got the piano for $800, which he claims was the original price with the agent, but the terms of payment were changed; the initial and subsequent payments being materially increased. Their conflicting testimony presents an issue of fact relative to the amount paid to the extent of $50 and as to interest on deferred payments.

Plaintiff, while admitting his signature to the contract, testified that he did not know it was a contract but supposed he was signing a receipt for the piano, and therefore did not ask any questions as to its contents, and could not read it over, being unable to read English and speaking English but imperfectly. He had been in the saloon business in this country for over 16 years, and it is claimed that he could understand and speak English fairly well when talking about ordinary matters. His ability in this particular is a matter in dispute, as is also the question of whether or not the contract was read and explained to him. Defendant and Maliniemi, who signed as a witness, testified that it was. Plaintiff testified that it was not, and that, according to the agreement as

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made and understood by him, no interest was to be paid.

All parties concede, and defendant testified, that there was an oral agreement for a different price than that stated in the contract. Defendant calls it a rebate. Under the testimony given and undisputed facts shown, we think that the door was open for oral testimony as to just what the agreed price was and whether it was with or without interest. If it was without interest and plaintiff has paid the full $800, he is entitled to recover from defendants the value of the piano at the time and place of conversion. If he has only paid $750, or if it was not understood and agreed that there should be no interest, he cannot recover.

Irrespective of the foregoing questions, the verdict and judgment herein cannot be sustained. The measure of damages in a trover case is the true cash value of the property converted at the time and place of conversion, in the absence of any testimony showing a peculiar value in the goods to the owner, and there is no such testimony in this case. *Tuttle* v. *White*, 46 Mich. 485 (9 N. W. 528, 41 Am. Rep. 175); *Iler* v. *Baker*, 82 Mich. 226 (46 N. W. 377); *Spoon* v. *Railway Co.*, 86 Mich. 309 (49 N. W. 35).

The verdict and judgment in this case were for $527.80. There was no testimony introduced upon which to base such a verdict. Plaintiff introduced no testimony, before he rested, as to the value of the piano, except that he paid $800 for it in 1908 on a contract with deferred payments and without interest. The only testimony as to value, at the time and place of the alleged conversion, is that of defendant, a piano dealer with many years' experience in the business. He was cross-examined and re-examined on the subject, testifying, in part, as follows:

"It has been in use nearly four years. Its fair

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market value would be about $300. Its value today as compared with when I first took it back, is just the same. It hasn't been opened; everything stood right in the store there; never been played or anything of the kind. Never has been opened to take the nickels out. Mr. Hautala has the key. I merely took it to my store and have had it there ever since, ready to deliver at any time he pays the balance. * * * You see it is different with an electric piano than a family piano because it is played so much more; that increases the wear and tear. You play an electric piano ten times as much as you play an ordinary piano. * * * It was nickel-in-the-slot piano used in the saloon. There is a big difference in the market for these electric pianos today than in 1908. They were new then and would take in a lot of money. Now everybody has got used to them and they don't play them near as much. The market for them today is not what it was four years ago in this community."

This was the only competent testimony in the case of the true value of the property at the time and place of conversion.

Judgment is reversed, and a new trial granted.

MOORE, MCALVAY, BROOKE, KUHN STONE, OSTRANDER, and BIRD, JJ., concurred.

EXCELSIOR WRAPPER CO. *v.* YUND.

1. EQUITY—ADEQUATE REMEDY AT LAW—ACCOUNTING.

Although equity will not usually assume jurisdiction of a case in which the court of law affords full and adequate relief, a bill lies for an accounting for money entrusted to defendant to purchase materials for complainant, to

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be expended in numerous contracts of purchase where defendant had neglected and refused to render an account, and the transactions were complicated, the credits and accounts were mutual and the facts solely within defendant's knowledge.

2. ACCOUNTING—TRUST RELATIONS.
The right to an accounting in equity is incident to most trust relations, and is not cut off by waiver of an answer under oath.

3. SAME—PRINCIPAL AND AGENT.
The mere existence of the relation of principal and agent, without peculiar and qualifying conditions, does not confer jurisdiction in chancery, but if lengthy or complicated accounts exist, or a discovery is required or trust relations are involved, a bill for accounting lies: defendant occupied the relation of a *quasi* trustee, as to funds intrusted to him to purchase materials, and the bill for an accounting was correctly sustained, on demurrer.

Appeal from Kent; McDonald, J. Submitted June 3, 1913. (Docket No. 24.) Decided July 9, 1913.

Bill by the Excelsior Wrapper Company against Philip Yund for an accounting. From an order overruling a demurrer to the bill of complaint, defendant appeals. Affirmed.

Clapperton, Owen & Hatten, for complainant.

John J. Sterling, for defendant.

STEERE, C. J. This suit comes before us on an appeal taken by defendant from an order of the circuit court of Kent county, in chancery, overruling his demurrer to complainant's bill. The reasons stated in defendant's demurrer why complainant is not entitled to relief in a court of equity are:

"Complainant has alleged no facts or circumstances in its bill of complaint which could not be shown, if true, in a court of law. It appears on the face of the bill of complaint that complainant claims defendant

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owes it a certain and definite sum, viz., $1,700, and therefore no accounting is necessary to determine the amount, if anything, due complainant. The bill of complaint on its face asks that defendant be required to account for $1,700 which is a certain and definite sum, and therefore complainant, if such sum is due it, had a complete and adequate remedy at law. The bill of complaint does not allege any circumstances or facts entitling complainant to any relief in a court of equity."

Complainant is a corporation, organized under the laws of Wisconsin, with its principal office at Grand Rapids, Mich., and on September 16, 1911, filed a bill of complaint in the circuit court of Kent county, in chancery, against defendant, stating that in the year 1906 defendant entered into a contract with complainant whereby he became its agent for purchasing excelsior bolts in Southwestern Michigan, to be used in the manufacture of excelsior at defendant's plant in Grand Rapids, according to an agreed schedule of prices and freight rates, which schedule was revised and amended from time to time, by agreement of the parties, to meet changing conditions; that defendant was given certain exclusive territory in which he was to contract for and purchase bolts, and all inquiring prospective sellers from that territory were referred to him; that by the terms of said contract he was to purchase said bolts with funds advanced him by complainant at prices within his discretion, his compensation to be the difference between the price he paid and the prices in their agreed schedules; that in pursuance of said agreement he contracted for and purchased bolts and shipped them to complainant for a number of years, large sums of money being advanced him by complainant for that purpose; that the bolts when received by complainants were inspected, measured, credit slips mailed to him, and the amount, according to the scale of prices then apply-

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ing, was credited to his account; that in the years 1909-1910 "repeated demands were made upon your orator by said defendant for further advances of money to pay for bolts which said defendant represented to your orator he was having cut and made ready for shipment, but which, because of the weather and scarcity of cars, it was impossible to load at that time;" that, relying upon such representations, complainant advanced large sums of money to him, as requested, for the purchase of bolts; that after said advance of money the bolts did not come forward as rapidly as promised, and in answer to demands for shipments defendant made further requests for advances, but—

"Neglected and refused to make further shipments of bolts and to account for his purchases or the moneys received by him; and your orator charges the fact to be that there is a large sum of money, to wit, the sum of $1,700, which has been paid to said defendant, for which your orator has never received any bolts, and that it has been, and is, unable to obtain an accounting with said defendant."

The bill further charges that defendant has entered into various contracts with various persons whose names are unknown to complainant, and has expended the money so advanced to him in full or partial payments upon said contracts, the benefits and advantages of which complainant is entitled to, but after repeated demands defendant has neglected and refused to make any statement or render any account in that connection; that defendant has disputed many of the items of account between the parties, denying the correctness of measurements, freight charges, and other items, but has not informed complainant as to the details of his claims; that the account between the parties "consists of many and complicated items;" that complainant is remediless according to the strict rules of the common law, and can only obtain relief

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in a court of equity. The bill prays for an accounting and that defendant be decreed to pay such amount as may be found due from him to complainant on such accounting.

In behalf of defendant it is particularly urged that his demurrer should be sustained because the bill is too vague, uncertain, and indefinite to require an answer; that only a money judgment is asked for and a certain and definite sum of money is alleged due from defendant to complainant, which calls for no accounting, and that for such relief there is a full, complete, and adequate remedy at law. In support of these contentions counsel cite *Cochrane* v. *Adams*, 50 Mich. 16 (14 N. W. 681); *Fred Macey Co.* v. *Macey*, 143 Mich. 138 (106 N. W. 722, 5 L. R. A. [N. S.] 1036); *Detroit Trust Co.* v. *Old National Bank*, 155 Mich. 61 (118 N. W. 729); and *Laubengayer* v. *Rohde*, 167 Mich. 605 (133 N. W. 535). Those cases and many others, there cited, discuss more or less exhaustively the vexed questions of concurrent and exclusive jurisdiction of law and equity in cases of fraud, accounting, etc., and all sustain the general proposition, stated in *Detroit Trust Co.* v. *Old National Bank*, *supra*, that "in this State equity has not taken jurisdiction of cases where a suitor has a full, complete, and adequate remedy at law, unless it is shown that there is some feature of the case peculiarly within the province of a court of equity," and they also recognize that where such a feature is shown equity will take jurisdiction to meet the particular exigency, even though there may also be a remedy at law. In *Fred Macey Co.* v. *Macey*, *supra*, it is said:

"And a suit for money had and received might answer every purpose, yet circumstances may justify an accounting or an injunction."

The bill in this case shows trust relations. It alleges that defendant was intrusted by complainant

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with certain money to be expended for a specific purpose, and that he had neglected and refused to account for it; that the relations of the parties and their dealings together involve an account between them with many and complicated items pro and con; that many of these items, and certain of the transactions out of which they arose, are solely within the knowledge of defendant. If they were equally known to both parties, and complainant fully informed concerning them, as counsel states, no accounting would be necessary; but the bill specifically alleges they are not, and on demurrer the bill is to be taken as true. Neither are the items of account all on one side, as in *Laubengayer* v. *Rohde, supra,* but, according to the allegations in the bill, there is a series of transactions with mutual demands.

That fiduciary or trust relations between the parties are involved is clearly alleged. Complainant charges contracts of purchase made by defendant, in which they had a joint interest, and on which full or partial payments were made with its money intrusted to him for that purpose; that it is entitled to the benefit of the same when disclosed, and that the names of the parties with whom such contracts were made are unknown to it, and that the specific undertaking involves unsettled and complicated accounts. In *Cochrane* v. *Adams, supra,* it is said:

"The right to an accounting in equity is incident to most trust relations, and is not cut off by a waiver of an answer under oath. Unless it is clear that complainant is already fully informed, he has a right to the information and the accounting."

See, also, *Morris & Co.* v. *Whitley,* 183 Fed. 764 (106 C. C. A. 206), and *Marvin* v. *Brooks,* 94 N. Y. 71. Defendant contends complainant is shown by the bill to be fully informed, and states specifically that there is a definite sum of money, $1,700, due com-

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plainant from defendant. We have quoted the allegation in the bill. It does not state that any certain sum is due complainant, but that in these transactions it has paid to defendant large sums of money stated, under a videlicet, as amounting to $1,700, for which it has never received any bolts, and is unable to obtain an accounting with defendant.

The existence of a bare agency, without further peculiar and qualifying conditions, is not sufficient to confer equitable jurisdiction, but equity will take jurisdiction when, out of such agency, there arise lengthy and complicated accounts, the need of a discovery, or the existence of fiduciary or trust relations. In this case, when defendant was intrusted with complainant's money, to be expended and applied in his discretion at various times and places in dealings with various parties unknown to complainant, for the specific purpose of purchasing a commodity in which both were materially interested, he became a *quasi* trustee of the money so intrusted to him and of the property purchased with such money; and he may be required to account in equity for his stewardship, especially where it has resulted in an account "of many and complicated items," the details of which, in many instances, are peculiarly within his knowledge.

We think the bill makes out a case for accounting, and equitable relief in that connection, that it calls for an answer, and the trial court properly overruled the demurrer to said bill.

The decree is affirmed, with costs.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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FOSTER *v.* FOSTER.

APPEAL AND ERROR—DIVORCE—DECREE—TIME.

On its own motion this court will dismiss an appeal in divorce proceedings taken nearly two years after the entry of a decree, notwithstanding the subsequent filing of a petition for rehearing, denied by the circuit court. Jurisdiction of the Supreme Court in chancery appeals is limited to the maximum period fixed by statute and court rules.

Appeal from Eaton; Smith, J. Submitted June 5, 1913. (Docket No. 21.) Decided July 9, 1913.

Bill by Elizabeth Foster against Wesley Foster for divorce. From a decree for defendant, complainant appeals. Dismissed.

G. D. Blasier, for complainant.

Elmer N. Peters, for defendant.

OSTRANDER, J. A decree of divorce was granted upon the cross-bill of defendant December 3, 1910. The cause was contested, and the decree was upon the merits. No provision for alimony was made, and no reference made in the decree to property rights. The parties were then, and for some time had been, separated. On the 11th day of June, 1912, complainant filed in the court, and apparently in the cause, a petition in which it is asserted that, upon the pleadings and proofs in the divorce suit, no decree ought to have been granted to defendant, and, if it ought to have been granted to either party, the decree is *erroneous* because the court failed to settle property rights. It is prayed that the cause be reheard. A rehearing was denied; the court in a written opinion

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stating that complainant's solicitor in the divorce proceeding conceded that complainant had not made a case entitling her to a decree, that certain representations were made to him respecting property matters, and that complainant's solicitor agreed that, in view of the arrangement made, it would be proper to enter the decree for defendant, as was done. Complainant has made and settled a case for appeal to this court, in which is set out the testimony given in the divorce proceeding. In her brief it is argued that defendant made no case entitling him to a decree for divorce, and that in any event the court should have taken some action pursuant to Act No. 259, Pub. Acts 1909 (4 How. Stat. [2d Ed.] § 11496 *et seq.*). The case on appeal was settled December 13, 1912, notice of appeal being given November 12, 1912. The jurisdiction of this court in chancery appeals is limited to causes which are appealed within a certain time, and the maximum time for taking this appeal long ago expired. *Perkins* v. *Perkins*, 173 Mich. 690 (140 N. W. 161).

The appeal is therefore dismissed; and, as the jurisdictional question is not raised by defendant, and no motion to dismiss the appeal was made, the costs awarded to complainant are limited to a solicitor's fee of $20.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

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PEOPLE v. MARTIN.

CRIMINAL LAW—DISORDERLY HOUSE—HOUSE OF ILL FAME.

Notwithstanding a want of evidence that specific acts of lewdness had been committed in the house conducted by respondent, between the dates charged in the information, which alleged that respondent kept a house of ill fame, a verdict finding her guilty was sustained by evidence of the bad character of the place, of the persons who resorted thereto, and respondent's admissions on the stand that she had conducted a house of prostitution at the place in question, and about two weeks before the time stated in the information had been arrested as a common prostitute and had pleaded guilty, and on her testimony that, during the period charged in the pleading, men had visited the house at a late hour and had gone to an upper room with one of the female inmates, remaining until about four o'clock in the morning.

Exceptions before sentence from Houghton; O'Brien, J. Submitted June 12, 1913. (Docket No. 120.) Decided July 9, 1913.

Trixie Martin was convicted of keeping a house of ill fame. Affirmed.

Grant Fellows, Attorney General, and *J. A. Greene*, Assistant Attorney General, for the people.

Burritt & Burritt, for respondent.

OSTRANDER, J. Respondent is charged with keeping a house of ill fame, resorted to, etc., on February 3, 1912, and on divers other days and times between that day and February 20, 1912. It is certified to this court by the judge of the trial court that judgment has not been given and that exceptions have been settled pursuant to the provisions of 3 Comp. Laws,

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§ 11964.[1] We do not find in the printed record evidence that the practice indicated in the statutes has been followed. The practice indicated is simple and it is recommended that counsel follow it. There is also a rule of this court which appears to have escaped the attention of counsel for appellant. It is Rule 40, and it requires that the brief of a party bringing a cause into this court shall contain a clear and concise statement of the facts of the case, distinct from argument, and of the errors upon which he relies, the questions involved, and the manner in which they are raised. The fact that this is a case involving the personal liberty of the respondent alone induces us to consider any of the questions which appear to be raised by the exceptions and which are referred to in the brief for appellant.

Respondent was a witness in her own behalf. She testified that on February 3, 1912, and during the period laid in the information, she did not keep a house of ill fame nor one resorted to for purposes of prostitution and lewdness. She further testified, in substance and effect, that she had lived in the house in question for two years and up to the 17th or 18th of January, 1912, paid rent for it at the rate of $100 a month; that she kept a house of prostitution there for a term and named four or more girls whom she kept there; that she and the other inmates were arrested on or about January 16, 1912, taken before a justice of the peace, and all pleaded guilty of being common prostitutes and paid fines. At that time, she testified, she *quit the business* and was not carrying it on on February 3, 1912, nor thereafter within the period laid in the information. Two of the girls arrested with her were there February 3d. She testified that they were not then prostitutes, although previous

[1] 5 How. Stat. (2d Ed.) § 15135.

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to that time they had been. And she testified that with her permission and knowledge no acts of prostitution and lewdness occurred there during the period laid in the information. But she testified also that on the night of February 3d men came to the house at a late hour, were admitted, or, finding the door open, entered, one of them at least visited an upper room with one of the girls, all of them remained the most of the night, an affray occurred, an officer was sent for and came at about 4 o'clock in the morning. She did not concern herself with the purpose of the visit or with the conduct of the other inmates of the house. In view of this testimony and of the further undisputed testimony of the situation and reputation of the house, the exceptions for respondent, some of which present what would in a proper case be interesting questions, become unimportant. For examples, the rulings admitting testimony of respondent's reputation for chastity and the reputation of other inmates of the house and admitting testimony of the general reputation of the house, whether they were all of them right or not are unimportant. The remaining question, namely, whether during the period laid the house was resorted to for the purposes already stated, was one to be answered as her own testimony and that of others should be viewed by the jury. No testimony of any specific act of lewdness on February 3d or thereafter was introduced. But we think it was for the jury to say whether, as claimed by respondent, the former actual character of the place and admitted earlier habits of its inmates had changed. The testimony of the acts of the girls other than respondent, of the serving of beer to the men by the girls, or some of them, on the night of February 3d, of the conduct of the men who were there, was sufficient, with the testimony of the respondent, to support a verdict of guilty. The criti-

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cisms which are made of the charge to the jury seem to us unwarranted.

Respondent's exceptions are overruled, and the cause remanded.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and BIRD, JJ., concurred.

PEOPLE *v.* KENNEDY.

1. CRIMINAL LAW—INFORMATION—IMMORAL ADVERTISEMENT.

An information based on Act No. 62, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5299), charging in the language of the first section of the statute that defendants did unlawfully advertise in a certain pamphlet annexed to the information "the treating and curing of venereal diseases, the restoration of lost manhood and lost vitality and vigor, which said advertisement contained expressions synonymous with the words 'lost manhood,' 'lost vitality and vigor,'" sufficiently apprised the defendants of the nature of the offense charged.

2. SAME—INDICTMENT AND INFORMATION—SURPLUSAGE.

Matters included in the pamphlet that did not relate directly to the charge of the information might be treated as surplusage, and did not affect the validity of the pleading.

3. EVIDENCE—CORRESPONDENCE—SUFFICIENCY OF PROOF.

Testimony of a distributing agent that he had received from respondents a letter, offered in evidence, that it contained a blank affidavit, also introduced, which mentioned the names of respondents, to be filled out to prove the distribution of certain pamphlets or advertising matter

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in behalf of respondents, that the witness had received the letter from them in reply to one written by him, with testimony identifying the advertising matter and showing its distribution, *held*, to warrant the admission of letter and blank affidavit in evidence.

4. SAME—MEDICAL TESTIMONY.

Respondents accused of publishing advertising matter in contravention of Act No. 62, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5299), were not prejudicially affected by testimony of a physician explaining the phrase "venereal diseases," and that the terms "lost manhood" and "lost vigor" had no medical significance.

5. CRIMINAL LAW — ADVERTISING MATTER — STATUTES — INSTRUCTIONS TO JURY—TRIAL.

It was proper to submit to the jury the letter offered in evidence, with instructions that it tended to show that the respondents proposed to send, for the purpose of distribution, certain pamphlets, and that the testimony tended to show that the pamphlets were received and distributed as charged, that the question whether the pamphlet violated the statutes was for the jury, and whether the language used was unlawful or synonymous with the prohibited phrases.

6. SAME—QUESTIONS OF LAW AND FACT.

While the court might have instructed the jury that the advertising matter distributed by respondents was a violation of the law, the finding of the jury that the respondents were guilty determined the point against them, and the submission of the question was not prejudicial to appellants.

7. SAME—ELECTION OF COUNTS.

The State could not be compelled to elect between two counts, one of which charged that respondents unlawfully advertised to treat and cure venereal diseases, etc., as set forth in a pamphlet annexed to the information, the other count alleging that the respondents advertised under their firm name that they were specialists in such diseases, as shown by said pamphlet.

8. SAME.

But where the prosecuting attorney elected to proceed under the first count, there was no ground of complaint.

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9. CONSTITUTIONAL LAW.

Said Act No. 62, Pub. Acts 1911, is valid and constitutional, and the court should give effect to the legislative purpose by so construing the language as not to render it invalid.

Exceptions before sentence from Wayne; Hosmer, J. Submitted June 12, 1913. (Docket No. 119.) Decided July 9, 1913.

James D. Kennedy and Charles J. Kennedy were convicted of a violation of Act No. 62, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5299). Affirmed.

Grant Fellows, Attorney General, *Hugh Shepherd*, Prosecuting Attorney, and *Harry B. Keidan*, Assistant Prosecuting Attorney, for the people.

Bumps & Bishop, for respondents.

STONE, J. The respondents were charged in the information, which followed the complaint and warrant, with a violation of certain of the provisions of Act No. 62 of the Public Acts of 1911 (2 How. Stat. [2d Ed.] § 5299), entitled:

"An act to prohibit certain classes of immoral advertising and provide punishment for violators thereof."

Section 1 of the act, in so far as it applies to the first count in the information, is as follows:

"Any person who shall advertise in his own name or * * * firm or pretended firm, * * * in any * * * pamphlet, circular * * * an advertisement of the treating or curing of venereal diseases, the restoration of 'lost manhood' or 'lost vitality or vigor' * * * shall be guilty of a misdemeanor," etc.

Respondents were examined upon said charge and were bound over to the Wayne circuit court for trial.

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The first count of the information charged that the respondents —

"To wit, on the 10th day of August, A. D. 1912, at the city of Plymouth, in said county, unlawfully did advertise under the firm name and style of Drs. Kennedy & Kennedy, in a certain pamphlet and circular, an advertisement of the treating and curing of venereal diseases, the restoration of lost manhood and lost vitality and vigor, which said advertisement contained expressions synonymous with the words 'lost manhood,' 'lost vitality and vigor,' and which said advertisement is in words and figures as follows, to wit:" (Here was annexed the entire of the printed pamphlet of 20 printed pages.)

The second count of the information charged respondents, at the same time and place, with having unlawfully advertised under their firm name that they were specialists in diseases of the sexual organs and diseases caused by sexual vices, self-abuse, and diseases of like kind, by then and there distributing and circulating certain pamphlets and circulars, in words and figures following, to which count the same printed pamphlet was annexed as to the first count.

Upon arraignment respondents stood mute, and a plea of not guilty was entered for each. Upon the trial both respondents were, by the jury, found guilty under the first count of the information; the prosecutor having elected to go to the jury upon the first count only, during the charge of the court.

The case has been brought here for review on exceptions before sentence, and there are ten assignments of error. The several assignments of error have been discussed by counsel for respondents under the following heads:

I. Defects in the information.

(a) That the information charges no offense under the laws of this State.

(b) That the information contains no statement of facts constituting any specific offense.

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(c) That the information does not inform the accused of the nature of the offense intended to be charged.

II. Errors in admission of evidence on the trial.

(a) That Exhibits 1 and 2, consisting of a letter and blank form of affidavit purporting to come from respondents, were improperly admitted in evidence.

(b) That Exhibits 3, 4, 5, and 6, being copies of the pamphlet attached to the information, were improperly admitted in evidence.

(c) That the testimony of Dr. James E. Burgess, as set forth in assignment of error No. 3, was improperly admitted.

III. Errors in the charge of the court.

(a) That the court erred in charging as follows:

"The letter has been offered in evidence. The testimony of the letter tends to show, if written by the defendants, that they proposed to send for the purpose of distribution certain pamphlets to Plymouth, and the testimony of the witness would tend to show, and you may find that it does show, that the pamphlets were so received and distributed as you have heard the testimony."

(b) That the court erred in further charging the jury as follows:

"I think it is for you to say whether that pamphlet is a violation of the provisions of this act, and whether it does in substance and in fact advertise them as specialists mentioned in the information, and whether in fact also the language there is not equivalent to the expressions prohibited by the statute, lost manhood, lost vitality or vigor."

IV. Election of counts.

(a) That the court erred in not compelling the prosecuting attorney to elect which count he would go to the jury on when requested by respondents.

(b) That the court erred in not explaining to the jury what part of his charge would not apply to the

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first count and what part of the testimony should be withdrawn from the consideration of the jury.

V. That the act in question is unconstitutional and void.

1. Counsel for respondents state in their brief that the respondents were examined upon the charge before the examining magistrate, and the count upon which they were convicted charged them with advertising in a certain pamphlet or circular, a copy of which was annexed to the count. We do not think that it can be claimed that the respondents were surprised or that they were not sufficiently apprised of what they were to meet. The evidence tended to show that the entire pamphlet was issued by respondents; and an inspection of it satisfies us that in its entirety it is an advertisement of the healing and curing of venereal diseases, the restoration of lost manhood and lost vigor, as charged in the count. We think that the general rule that, in charging or pleading offenses created by a statute, it is sufficient to describe the offense in the words of the statute, applies here, and that the information was sufficient. *Rice* v. *People*, 15 Mich. 9; *People* v. *Butler*, 122 Mich. 35 (80 N. W. 883); *People* v. *Kennedy*, 105 Mich. 75 (62 N. W. 1020); *People* v. *Comstock*, 115 Mich. 305-313 (73 N. W. 245); *People* v. *Glazier*, 159 Mich. 528-537 (124 N. W. 582); *People* v. *Quider*, 172 Mich. 280 (137 N. W. 546); *State* v. *McKee*, 73 Conn. 18 (46 Atl. 409, 49 L. R. A. 542, 84 Am. St. Rep. 124). In the *Quider Case*, Justice STEERE, speaking for this court, said:

"In criminal proceedings the accused is entitled to demand and know the nature and cause of the accusation against him. Beyond that, technical elaboration of pleadings fails to subserve the ends of justice, and becomes but ingenious pitfalls for one side or the other. In charging the offense, a detailed recital of the evidence by which it will be established is not required. Such facts must be averred that, if admitted,

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would constitute the offense and establish the guilt of the accused."

Moose v. *State,* 49 Ark. 499 (5 S. W. 885); *People* v. *West,* 106 N. Y. 293-295 (12 N. E. 610, 60 Am. Rep. 452).

Even though some of the matters in the pamphlet do not relate directly to the matters charged against the respondents, such matters may be rejected as surplusage. As was said in *People* v. *Laurence,* 137 N. Y. 517, 524 (33 N. E. 547, 549):

"It is not a legal ground of attack upon this indictment that it contains more than was necessary under the provisions of the Code. It has always been the rule that surplusage no more vitiates an indictment than a pleading in a civil action. *Lohman* v. *People,* 1 N. Y. 379 (49 Am. Dec. 340); *Dawson* v. *People,* 25 N. Y. 399."

We have examined the numerous cases cited by respondents' counsel and think them readily distinguishable from the instant case. There are peculiar reasons, applicable to offenses of the nature here charged, for not setting out in full all of the obscene matter contained in a publication. The early case of *People* v. *Girardin,* 1 Mich. 90, is instructive upon this subject.

The case of *Commonwealth* v. *McCance,* 164 Mass. 162 (41 N. E. 133, 29 L. R. A. 61), cited by respondents' counsel, has been examined by us, and it appears that in that case the indictment was held bad because it neither contained a copy of the obscene matter complained of nor any reference or description thereto, but simply named the book containing the matter. The book offered in evidence in that case contained 710 printed pages. It was known as the "Decameron of Boccaccio" and contained ten novels or stories for each of ten days' entertainment. Of these 100 novels, only six were introduced in evidence by the commonwealth, and the court said:

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"We cannot know what parts of the book the grand jury found to be obscene, indecent, and impure, and we know of no way whereby from the indictment the defendant could know before the trial what parts of the book would be put in evidence by the commonwealth."

The court then quotes from *Commonwealth* v. *Holmes*, 17 Mass. 336, as follows:

" 'The second and fifth counts in this indictment are certainly good for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it.' This decision has been followed by many of the courts in this country" —citing, among other things, *People* v. *Girardin, supra.*

Neither do we think the case is controlled by *State* v. *Smith*, 17 R. I. 371 (22 Atl. 282), cited by respondents' counsel. It seems to be held in Rhode Island that it is not sufficient to charge such an offense in the language of the statute.

We are of opinion that the first count in this case, the pamphlet annexed being a part thereof, is sufficient in the law to apprise the respondents of the charge against them. To advertise in a pamphlet is to give public notice by such means. Here the whole advertisement is set out according to its tenor.

2. It is contended that Exhibits 1 and 2, consisting of the letter and blank form of affidavit, were improperly admitted in evidence.

Charles W. Pullen, a witness sworn on behalf of the people, testified that he lived at Milan, Mich., and was in the distributing business, manager of the Redmond Distributing Company, distributing advertising matter. He was asked if he had any correspondence with the respondents. After the discussion of objections raised by respondents' counsel to any evi-

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dence in the case because of defects in the information and the overruling of that objection, the witness answered that he did have correspondence with the respondents. He stated when he received the first letter from them, and stated that it was about August 1st. He was then shown Exhibit 1 and asked if that was a letter which he had received from the respondents, and he answered in the affirmative. That letter was received in evidence under the general objection that it was incompetent, immaterial, and irrelevant. The letter read in evidence, omitting the printed heading, was as follows:

"DETROIT, MICH., Aug. 5, 1912.

"THE REDMOND DISTRIBUTING AGENCY,
"Milan, Mich.

"Dear Sirs:

"In reply to your recent letter let us say that we will send 1,000 booklets to Plymouth by express, 1,000 to Dundee by express and 2,500 by freight to Milan, instead of sending 500 to Clinton, we are sending 1,000 to Dundee.

"As soon as the distributing is done, have the enclosed affidavit blank filled up and sworn to, for which we allow 50 cents for expense, return it to us and we will forward your check.

"Very truly yours,
"DRS. KENNEDY & KENNEDY."

Exhibit 2 was the blank affidavit accompanying the letter and reads as follows:

"No. Sworn Statement of
"Distributing Agent for Drs. Kennedy & Kennedy
"City of
"County of
"State of
"Town
"County
"State being duly sworn deposes and says:

"1st. That he has been acting as the agent of has done the distributing of certain booklets as advertising matter for Drs. Kennedy & Kennedy within the following territory: [Then there are five blank lines.]

"2. Between date and date 191

"3. That he distributed number of booklets, rate dollars per M.

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"4. That said distributing has been faithfully done and in strict compliance with the instructions contained in the application for agency signed by me.

"5. That he did not employ, hire or engage any person under 18 years of age to distribute any of said booklets and none of said booklets were intentionally or negligently wasted or destroyed by this deponent, or by any other person, to his best knowledge and belief.

"Futher deponent saith not.

"....., Agent or Distributor.

"Subscribed and sworn to before me this ..... day of ....., 191..

"....., Notary Public.

" County State."

This witness further testified that he had an agent at Plymouth, Mich., by the name of Alton Richwine, but witness did not see the pamphlets that his agent distributed at Plymouth.

Alton Richwine testified, in substance, that he lived at Plymouth, Wayne county; that he was nearly 17 years old; that during vacation from school he had "peddled these bills" (that is, distributed some pamphlets in the township of Plymouth for the Redmond Distributing Company that Mr. Pullen was connected with); that he distributed them at the request of Mr. Pullen; that he distributed 600, a few days prior to the 15th of August, around the 10th. He was then shown Exhibit 3, which was a copy of the pamphlet attached to the information, and identified it as like those he distributed in the township of Plymouth; he testified that he distributed them from house to house and placed them on the porches and sometimes in farmers' rigs; that these pamphlets were delivered to him at Plymouth; and that they came by freight from Milan.

Other witnesses testified and were shown other exhibits identical in appearance with the pamphlet attached to the information; they testified that they

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found them at their houses and on their porches at about the time charged in the information.

Another witness testified that he knew the respondents and had known them for some years, and knew their place of business in the city of Detroit at Michigan and Lafayette, the Triangle, and Griswold, "as they call it." It may be here stated that the pamphlet received in evidence and attached to the information, upon the inside front cover, contained the following words, "Drs. Kennedy & Kennedy, corner Michigan & Griswold streets, Detroit, Michigan," below which is the cut of a building, there appearing upon its front the name "Drs. K. & K.," below which is the following: "Located in our own office building cor. Michigan, Griswold and Lafayette Sts."

It will be observed that the letter above copied states that it is "in reply to your recent letter." We are of opinion that, in connection with the other evidence, this letter was admissible in evidence under the rule stated in *People* v. *Hammond,* 132 Mich. 422, 425-427 (93 N. W. 1084). And in the same connection, we think that the inclosure, the blank affidavit, was properly received in evidence.

In this connection further objection was made to the evidence of Dr. James E. Burgess, a witness on behalf of the people, who testified as to what was meant in medicine by the term "venereal diseases," and stated that a venereal disease was a disease of the venereal organs, describing them; and also testified that the terms "lost manhood" and "lost vigor" had no medical significance. We are unable to see wherein the respondents were prejudiced by the testimony of Dr. Burgess. *Strang* v. *People,* 24 Mich. 1-9.

3. We have examined the charge of the court in the instance complained of in the seventh assignment of error. We think that the letters were properly before the jury, and that the instruction as to their contents was properly submitted.

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As to the eighth assignment of error, we think the court might well have said to the jury that the pamphlet in evidence was a violation of the provisions of this act. He left it, however, to the jury. They, having convicted the respondents, necessarily found that the pamphlet was a violation of the act. It should be noted that, at the time this portion of the charge was given, the prosecuting attorney had not elected to go to the jury upon the first count alone, and both counts were then before the court and jury.

4. The election of counts. We think that under our own authorities the case might well have been submitted to the jury upon both counts in the information, and that the people should not in such a case be compelled to elect between the counts. *Van Sickle* v. *People*, 29 Mich. 61; *People* v. *Sweeney*, 55 Mich. 586 (22 N. W. 50); *People* v. *McDowell*, 63 Mich. 229 (30 N. W. 68); *People* v. *Dyer*, 79 Mich. 480 (44 N. W. 937); *People* v. *Summers*, 115 Mich. 537 (73 N. W. 818).

The prosecutor, however, elected to go to the jury on the first count. There is nothing here of which the respondents can complain, as it appears that the court, upon the election having been made, charged the jury as follows:

"Very well, gentlemen of the jury, I think under those circumstances, the election having been made to go only on the first count, of course the question in this case is whether this pamphlet does *advertise* the cure of venereal diseases, the restoration of lost manhood, and lost vitality and vigor."

5. We are unable to agree with counsel for the respondents that the act in question is unconstitutional. The first section of the statute describes the offenses charged in the information in the language we have given. Section 3 of the act provides as follows:

"It is further enacted that any advertisement found

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in any newspaper, pamphlet or circular containing the words 'lost manhood,' 'lost vitality or vigor,' or other expressions synonymous therewith, shall be *prima facie* evidence of the guilt of the party or parties subscribing to the said advertisements, their agents or representatives, and the same penalty shall apply to the publishers of papers containing the same as prescribed in section one."

It is the duty of the court to give effect to a legitimate legislative purpose plainly indicated, if it can reasonably be done, and not construe language so as to invalidate an act where the language is fairly susceptible of a construction consistent with validity. The act appears to be a reasonable police regulation.

The court in its charge to the jury, instead of using the word "synonymous," left it to the jury to find "if the language there is not equivalent to the expressions prohibited by the statute, 'lost manhood,' 'lost vitality or vigor.'"

Counsel for respondents cite the case of *Hewitt* v. *State Board of Medical Examiners*, 148 Cal. 590 (84 Pac. 39, 3 L. R. A. [N. S.] 896, 113 Am. St. Rep. 315, 7 Am. & Eng. Ann. Cas. 750). In that case the statute provided that "all advertising of medical business in which grossly improbable statements are made" should constitute unprofessional conduct, for which the medical examiners might revoke the certificate; and the act did not define what statements should be "grossly improbable," and the court there held that the statute left it to the whim or caprice of the medical examiners without any standard for their guidance, and that it was too indefinite and uncertain to be enforced by the revocation of the physician's certificate and was void. We think that case readily distinguished from the instant case. The words "lost manhood" and "lost vitality and vigor" are ordinary words which could be readily understood by the jury, and it was properly left to them to say whether the

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publication complained of contained words that were synonymous with those terms or equivalent to those terms. A perusal of the pamphlet in evidence shows that respondents carefully avoided the use of the words "lost manhood," "lost vitality and vigor," but they used words and phrases that are just as effective and as well understood as the words mentioned in the statute.

The language used by the supreme court of errors in *State* v. *McKee*, 73 Conn. 18, 31 (46 Atl. 409, 414 [49 L. R. A. 542, 84 Am. St. Rep. 124]), is appropriate here:

"The gist of the statutory offense is the massing of these immoralities in one publication for circulation, and demands that the paper shall be mainly or principally devoted to the publication of such material. The law cannot be evaded by intermingling other material, whether for the purpose of evasion or of securing attention to the main subject-matter, so long as the principal resulting effect is the circulation of this massed immorality; but that main result must appear, or the offense is not committed. * * * The court properly left to the jury the determination, as a question of fact, whether the papers in evidence were thus devoted to the publication of material claimed to be within the statutory description."

In *Commonwealth* v. *Buckley*, 200 Mass. 346 (86 N. W. 910, 22 L. R. A. [N. S.] 225, 128 Am. St. Rep. 425), which was an indictment charging the defendant with selling a book containing obscene, indecent, and impure language, manifestly intending to corrupt the morals of youth, the court said:

"The defendant strongly contends that the judge should have defined at greater length than he did the terms 'obscene,' 'indecent,' 'impure,' and 'manifestly.' While it is true perhaps that by illustration or the use of synonyms the judge might have explained more fully the meaning of these terms, still it is to be remembered that they are not technical terms. They are common words and may be assumed to be under-

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stood in their common meaning by an ordinary jury. So far as the judge undertook to define we see no error, and we cannot say as matter of law that his failure to define more at length was erroneous in law or prejudicial to the defendant."

We find no reversible error in the record, and the conviction of respondents is affirmed, and the case will be remanded to the circuit court for judgment.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

ENNEST *v.* PERE MARQUETTE RAILROAD CO.

1. RAILROADS—RECEIVERS—ACTIONS—COMMENCEMENT—PROCESS—SERVICE—PRINCIPAL AND AGENT.

   Service of a declaration and rule to plead upon the station agent of a railroad corporation, after the appointment f receivers by the Federal court and notice to the agent to continue his employment for the receivers as theretofore, is a valid and sufficient commencement of suit against the railroad company.

2. SAME.

   The corporation continued to exist as a railroad company, although it was in the hands of receivers, and its station agent remained, for the purpose of serving process, the agent or employee of the corporation within the meaning of Act No. 260, Pub. Acts 1899 (5 How. Stat. [2d Ed.] §§ 13523, 13524).

Certiorari to St. Clair; Law, J. Submitted June 5, 1913. (Docket No. 5.) Decided July 9, 1913.

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Case by Theodore Ennest against the Pere Marquette Railroad Company for personal injuries. Defendant filed a plea in abatement, which was overruled. Defendant brings certiorari. Affirmed.

Bills, Parker, Shields & Brown, for appellant.

Stevens, Graham & Stevens, for appellee.

STONE, J. This case comes into this court on certiorari to review the order of the trial judge overruling defendant's plea in abatement to the declaration. On October 24, 1912, plaintiff filed a declaration against defendant in the circuit court for the county of St. Clair, on which was indorsed a rule to plead. A copy of this declaration, with notice of the rule to plead, was served on John J. Coryell, station and ticket agent at the Port Huron, Mich., station, a station along the line of the defendant railroad, on November 1, 1912. The plaintiff seeks to recover damages for personal injuries alleged to have accrued to him on December 31, 1911, by reason of the negligence of the defendant. The testimony taken on the trial of the issue formed on the plea in abatement shows that John J. Coryell had been, for about six years prior to April 5, 1912 (the date of the order creating the receivership hereinafter described), the station and ticket agent of defendant at the Port Huron station; that on that day he received notice from the receivers of their appointment, and afterwards acted under their control, and was so acting on November 1, 1912, as such station and ticket agent. That notice was as follows:

"DETROIT, MICHIGAN, April 5, 1912.
"12 o'clock noon.

"All officers and agents of the Pere Marquette Railroad in the United States:

"By virtue of an order made this day by the district court of the United States for the eastern dis-

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trict of Michigan, in the case of the American Brake-shoe and Foundry Company against the Pere Marquette Railroad Company, the undersigned have been appointed and have qualified as receivers of all the property and business of said Pere Marquette Railroad Company, of every kind and character and wherever situate and have taken possession and do hereby take possession of all such property and business and pursuant to the authority of the said court do hereby direct the continuance of said business in the names of the undersigned as receivers and until further orders substantially as it has been conducted theretofore.

"Until further orders all agents and employees *of the company* connected with the business will perform the duties heretofore performed by them, and make reports and remittances as heretofore. The depositories of the company will be the depositories of the undersigned and the existing tariffs and rules and regulations will remain in force until further notice.

"NEWMAN ERB,
"DUDLEY WATERS,
"FRANK BLAIR,
"Receivers."

The plea in abatement (filed with the plea of the general issue under the rule) alleges that John J. Coryell, the person upon whom the service of declaration with rule to plead was made, on November 1, 1912, was not at the date of such service an agent or employee of the Pere Marquette Railroad Company, and that the service of said declaration and rule to plead on him was wholly inoperative to bind the defendant, or to give the court jurisdiction over it. On the trial of the issue it appeared that on April 5, 1912, the defendant, by the order of the district court of the United States for the eastern district of Michigan, southern division, was placed in charge of the above-named receivers. This order gave authority to the receivers, among other things, to take possession of all the railroads and other property of the defendant—

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"To run, manage, and operate the said railroads and property; * * * to maintain, preserve, and protect the said property and assets, and to keep the same in proper condition and repair, so that the same may be safely and advantageously operated and used; * * * to secure and develop the business of said railroad company; * * * to employ and discharge and fix the compensation of all * * * officers, managers, superintendents, attorneys, agents, and employees, as in their discretion shall from time to time be needed in the performance of their duties as such receivers; * * * to keep the railroads and other property of said railroad company and its auxiliary companies employed and used in the manner in which they have heretofore been used and employed, so far as the said receivers, in their discretion, shall see it to be for the best interests of all parties concerned in the property and business of said railroad company; * * * to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property, and trust hereby vested in them; and likewise to defend all actions that may be instituted against them, and also to appear in and conduct the prosecution or defense, as the case may be, of any suits now pending or hereafter commenced in any court against the said railroad company, the prosecution or defense of which will, in the judgment of said receivers, be necessary for the proper protection of the property and business placed in their charge. * * * That the said railroad company and its officers, directors, agents, and employees and all other persons claiming to act by, through, or under said company, and all other persons whosoever, be and hereby they are severally and collectively enjoined and restrained from interfering in any way whatever with the possession and management of any part of the property over which the said receivers are hereby appointed, or interfering in any way to prevent the discharge of their duties or their operating the same."

The learned circuit judge in stating his reasons for overruling the plea in abatement, in part said:

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"As will be seen from the above brief extracts from this order, the court which made it contemplated that the receivers should operate and manage the defendant railroad temporarily. This receivership has not dissolved the corporation known as the Pere Marquette Railroad Company, nor does the proceeding contemplate the dissolution, or the winding up of the corporation. For the purpose of attaining certain ends the railroads and other property of defendant have, by order of the court, been taken from the possession and management of the regular officials of defendant, and given over to certain officers of the United States district court, called receivers. By this order the receivers are directed to operate the railroads of defendant. In other words, instead of being under the management and control of the regular officials of the corporation, the Pere Marquette Railroad was, on the 1st day of November, 1912, under the management of the receivers, but the Pere Marquette Railroad Company was still in existence. It was still a 'railroad company in this State.' It had a 'station agent' and 'ticket agent' at the Port Huron station, 'a station along the line * * * of the railroad of such company.' This station and ticket agent was John J. Coryell, the person served in this action on November 1, 1912. It is true that the record in this case shows that said agent, on notice from the receivers, attorned to them instead of his former superiors, the officials of the company. However, the Pere Marquette Railroad Company was still 'a railroad company in this State,' though its affairs were now under a different management, and Mr. Coryell, though now under the direction of the receivers, was still the station and ticket agent of 'a railroad company in this State' within the meaning of the statute to which I shall now refer, and still is such agent. Act No. 260 of the Public Acts of 1899 (5 How. Stat. [2d Ed.] §§ 13523, 13524), provides as follows:

"'That whenever in any suit or proceedings, either in law or equity, it shall become necessary to serve any process, notice or writing upon any railroad company in this State, it shall be sufficient to serve the same upon any station agent or ticket agent at any station or depot along the line, or at the end of the railroad of such company.'"

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That Mr. Coryell was the station and ticket agent at the station at Port Huron, of the railroad of the defendant, there can, we think, be no question.

Upon whom process shall be served in order to institute a suit against the artificial person known as a corporation is in this State a matter of statute; and, as here appears, we have a special statute governing service upon railroad companies. The question here raised seems to be a new one in this State, and we are at liberty to adopt the more reasonable rule. May it be said that in this case Mr. Coryell was, at the time of the service upon him, the proper person to receive service, notwithstanding his relation to the receivers? It is worthy of note that there was nothing in the order appointing the receivers, or in the notice served on the station or ticket agent, removing such agent from his former position. The language of the notice was significant:

"Until further orders all agents and employees *of the company* connected with the business will perform the duties heretofore performed by them, and make reports and remittances as heretofore."

Mr. Coryell might continue the agent of the company, for any purpose not inconsistent with his duty to the receivers. Such double agency is not rare. By the order appointing them the receivers were authorized and empowered to appear and defend any suits which might be commenced against the company, the defense of which would in their judgment be necessary for the proper protection of the property and business placed in their charge. Any suit against the company to recover damages might well be said to be a suit affecting the property which they had in charge, and service of process on the station or ticket agent at any station on the line of the road might be to the advantage of such receivers. There would be nothing incompatible in Coryell maintaining his relation to the corporation, and to the receivers at the

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same time. It is very evident that there is nothing found in this record justifying us in holding that he has ever been discharged from his position by either the company or the court. Outside of this State this question has been passed upon by the following courts of last resort, and the courts have differed in their conclusions: In the State of New York, in the case of *Faltisko* v. *Railroad Co.*, 12 Misc. Rep. 478, 33 N. Y. Supp. 679, affirmed in 151 N. Y. 650 (46 N. E. 1146), it was held that the appointment of a receiver of a railroad company does not affect the relation of a division superintendent as "managing agent" of the company, on whom the statute provides process against the company may be served, where he was never removed by the company, but retains his position after the appointment of the receiver. In Tennessee, in the case of *Simpson* v. *Railway Co.*, 89 Tenn. 304 (15 S. W. 735), it was held that suit against a railway corporation will not be abated upon its plea, averring that the suit had been brought after the road had passed into the hands of a receiver, and that process had been served upon a station agent of the receiver, where it appears that such agent had been originally employed by the company, and continued in the same service under the receivership. The court said:

"It will be remembered that this is no effort on the part of the receiver to abate suits by reason of a right to intervene and compel a discontinuance of actions except in court where the receivership with litigation involving it is pending but an effort by the company to deny its agent because its road had been placed in the hands of a receiver. In such case no reason appears to us why he does not still, in a proper sense, represent the company which in another is represented by the receiver."

See, also, *Louisville, etc., R. Co.* v. *Cauble*, 46 Ind. 277; *Grady* v. *Railroad Co.*, 116 N. C. 952 (21 S. E. 304).

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Upon the other hand, defendant has called our attention to the following cases: *Cherry* v. *Railroad Co.*, 59 Ga. 446; *Heath* v. *Railway Co.*, 83 Mo. 617. *Cherry* v. *Railroad Co.* has been followed by the Georgia court in *Cain* v. *Railway*, 7 Ga. App. 461 (67 S. E. 127). Defendant claims that these last-cited cases hold that when the property of a railroad company has passed into the hands of receivers, and its road is being operated by them under an order of the court, service of process on one of the employees of the receivers will give no jurisdiction over the company. We think that the Georgia cases substantially so hold; but it is worthy of note that in *Cherry* v. *Railroad Co.* the court calls attention to the fact that the agent under the new arrangement was required to give, and did give, a bond to the State for the faithful performance of his duties, and that the agent had ceased to act for the company, and had become the agent of the State. In *Heath* v. *Railway Co.* it appeared that the injury complained of resulted from the acts of the receiver, or his agents, within the scope of his official duty in operating the road, and that the defendant had nothing to do with it, and, by virtue of the receivership, was prohibited from operating the train, which came in contact with the plaintiff's stock.

We are of opinion that the rule stated by the New York and Tennessee courts in the cases above cited is the better and more reasonable rule, and that the circuit judge did not err in overruling the plea in abatement.

The order of the circuit court is therefore affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN OSTRANDER, and BIRD, JJ., concurred.

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BARNHART *v.* MICHIGAN CENTRAL RAILROAD CO.

Certiorari to Ingham; Wiest, J. Submitted June 11, 1913. (Docket No. 72.) Decided July 9, 1913.

Case by Sherman T. Barnhart against the Michigan Central Railroad Company and the Pere Marquette Railroad Company for personal injuries. The court overruled defendant's plea in abatement, and defendant last named brings certiorari. Affirmed.

Bills, Parker, Shields & Brown (Cummins & Nichols, of counsel), for appellant.

Raudabaugh & Person, for appellee.

KUHN, J. This case involves substantially the same state of facts and the same legal question as the case of *Ennest* v. *Railroad Co., ante,* 398 (142 N. W. 567), and the disposition of this case is necessarily controlled by the decision rendered therein. We are therefore of the opinion that the plea in abatement was properly overruled.

The order of the circuit court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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In re DUBOIS' ESTATE.

ROHRIG'S APPEAL.

1. TRUSTS—ASSIGNMENTS FOR BENEFIT OF CREDITORS—EVIDENCE.
   Where claimant held a note, given to pay indebtedness that had in part accrued before his debtor executed a deed of trust, and where claimant could not testify what part so accrued or what part of the note represented subsequent indebtedness, the court did not err in directing a verdict in favor of the trustee's estate.

2. CONTRACTS — NOVATION — CONSIDERATION — ASSUMING INDEBTEDNESS.
   In a proceeding to enforce a claim against the estate of a decedent, who had received property from his father subject to the debts of the latter, a letter written by the son promising to pay debts created after the execution of the trust deed was improperly received in evidence, in the absence of testimony that claimant promised to forbear collecting his claim against the father, or granted any extension or favor in consideration of decedent's assuming the debt.

3. ESTATES OF DECEDENTS—APPEAL FROM FINDING OF COMMISSIONERS ON CLAIMS—EXECUTORS AND ADMINISTRATORS.
   On appeal from the commissioners on claims in an estate, the cause is heard *de novo*, and the executrix who did not appeal may review the judgment of the circuit court on error.

4. EVIDENCE—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED.
   Testimony of a claimant as to the contents of a letter sent by him to decedent, and referred to in a reply that decedent sent to claimant, was properly excluded as equally within the knowledge of decedent. Act No. 30, Pub. Acts 1903 (5 How. Stat. [2d Ed.] § 12856).

Error to Monroe; Golden, J. Submitted June 20, 1913. (Docket No. 51.) Decided July 9, 1913.

Claim by Frank J. Rohrig against the estate of

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Louis J. Dubois. The commissioners on claims disallowed a part of the claim. Claimant appealed to the circuit court. From a judgment for claimant for part of amount claimed, both parties bring error. Reversed; new trial denied.

Anderson, Rackham & Wilcox, for appellant.

E. R. Gilday and *Willis Baldwin,* for appellee.

KUHN, J. This appeal is to review a judgment directed by the circuit court for the county of Monroe, allowing a portion of plaintiff's claim against the estate of Louis J. Dubois, deceased. In the year 1896, Louis Dubois, the father of the deceased, became involved financially, and on August 17th of that year, in order to provide for the payment of his debts, he conveyed all his real estate to his two sons, Louis J. Dubois, now deceased, and Edmund T. Dubois, charged with the payment of all debts he was owing at the time the trust deed was executed. Some time afterwards Edmund T. Dubois relinquished his interest in the trust deed, and the trust was thereafter administered by Louis J. Dubois up to the time of his death. The terms of the trust deed are broad enough to include any debts Louis Dubois might have been liable for or owed on the date of the deed, even though the amounts had not be disclosed to his sons. It appears that the claimant, for 10 or 12 years prior to April, 1912, had had business dealings with Louis Dubois, Sr., lending him money and signing his notes. The items making up this claim are: June 20, 1904, $120 cash advanced; May 31, 1905, cash $16.50; May 31, 1905, a note given for $250 by F. J. Rohrig to Louis Dubois as an accommodation paper and subsequently paid by Rohrig; and a note dated May 23, 1906, for $500.

It is claimed that this $500 note was given in pay-

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ment, at least in part, of moneys borrowed 10 years earlier. No claim is made that any of the other transactions antedate the trust deed, and the testimony of the claimant with reference to the $500 note is very indefinite and uncertain. He testified as follows:

"*Q.* Mr. Rohrig, you say part of this $500 note was borrowed back 10 years earlier, and you said you couldn't say how much, didn't you?
"*A.* Yes.
"*Q.* And when he made the first loan, you made the first loan to Mr. Dubois; after that he made payments, didn't he?
"*A.* Yes.
"*Q.* And then again he borrowed some more money?
"*A.* Yes.
"*Q.* And you had a sort of running account with him down to the time this $500 note was given?
"*A.* Yes.
"*Q.* And you can't state anything about what the original loan was?
"*A.* No; because they were in the shape of notes that were destroyed.
"*Q.* How large payments did he make after this first loan?
"*A.* I can't tell you that.
"*Q.* Haven't you any idea?
"*A.* No, sir.
"*Q.* He reduced his debt sometimes quite a bit, didn't he?
"*A.* Yes. And sometimes he increased it.
"*Q.* And how frequently would he do that?
"*A.* That would depend on the time; the notes were made for sometimes 90 days, sometimes 60 days, and sometimes 30 days.
"*Q.* And sometimes they were paid when due, and sometimes he wouldn't?
"*A.* Yes.
"*Q.* And sometimes he borrowed more money?
"*A.* Yes.
"*Q.* And he would give you another note for that?
"*A.* Yes.

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"*Q.* And then you bunched them up in this $500 note finally; is that right?

"*A.* Yes.

"*Q.* And you can't now make any estimate of what the original loan started at, and how much it was reduced?

"*A.* This is the fourth time I have answered you that question; no.

"*Q.* Do you know whether any part of that $500 note was for money advanced previous to August 17, 1896?

"*A.* I can't say definitely because I haven't any of the papers to go by; only from memory."

It is very evident from this that it would be impossible for a court or jury to determine how much of the money represented by the $500 note was advanced before the trust agreement was given, and the trial judge properly charged the jury with reference thereto, as follows:

"It appears from the bill itself that much of the present claim arose subsequent to the execution of the trust deed. To attempt to arrive at any sum as being due or owing when the trust deed was executed would be guesswork and speculation, and under the evidence in this case I charge you that the appellant has not shown that his claim, or any portion thereof, is covered or secured by the trust deed referred to, and the appellant cannot recover in this case under or by virtue of said trust deed."

On the trial of the cause, in order to substantiate the claim, a letter was received in evidence written by Louis J. Dubois, deceased, to the claimant, under date of October 25, 1905, the material portions of which being as follows:

"FRIEND FRANK:

"Your letter of the 22d was pretty near like the last straw on a camel's back. If I had known that my father owed you such a large amount at the time that I agreed to take the farm and pay his debts, I never would have done so, as I was already taking up about

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$30,000 worth of debt, which I have long since realized is more than my resources will permit. Up till this last spring I did not know of this indebtedness beyond the fact that he called on me for money from time to time to take care of a certain $220.00 note which I believe you endorsed and finally paid. What he did with all that money is more than I can tell. He surely did not help me with it, and in a measure I do not feel responsible; however, you have been such a good friend that I cannot see you lose it either, but I am in no position at present to pay anything. * * * This last affair has made me decide to sell the place and everything with it and pay up all of his indebtedness and dig out of Monroe to begin life over."

It is claimed that this letter is an independent promise to pay any debt of the father to Rohrig, whether created prior or subsequent to the trust deed, and is based upon a sufficient consideration. The consideration relied upon is a claimed forbearance on the part of Rohrig in not pressing his claim to judgment and making a levy on the reversionary interest of the father in the property covered by the trust deed. The infirmity in this position arises from the fact that the record does not disclose that plaintiff promised to forbear collection, extend time of payment, or grant any favor to any person in consideration of the deceased assuming any new debt. He does say he took no steps towards forcing the collection of the account after receiving the letter, but does not say that receiving the letter was the reason for his not doing so. No consideration having been shown for this promise made in the letter, it was improperly admitted in evidence. The court directed a verdict for the $220 note mentioned in the letter, less a payment claimed to have been made by some straw which Dubois had shipped Rohrig, amounting to $97.53. Without the letter, there was nothing left to support the claim, and a verdict should have been directed for the defendant.

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It is urged that, as the defendant did not appeal from the order of the probate court, she is not aggrieved by the action of the circuit court, and the appeal to this court should for that reason be dismissed. An appeal having been taken from the determination of the commissioners on claims, the matters in controversy were heard *de novo* in the circuit court, and either party had a right to appeal from the judgment of that court.

The executrix was served with notice to produce a letter claimed to have been written by claimant to the deceased, and referred to in the letter of October 25th. She testified that she was unable to find such a letter, and while claimant was on the witness stand he was asked to state the contents of the letter. It was objected to as stating matters equally within the knowledge of the deceased, and, upon the objection being sustained, an exception was taken, and error is assigned upon this ruling of the court. This ruling was correct, as clearly, this would come within the terms of Act No. 30 of the Public Acts of 1903 (5 How. Stat. [2d Ed.] § 12856). The claimant is testifying in support of his claim, and the cause is being defended by the personal representative of the deceased. The matter, if true, must have been equally within the knowledge of the deceased person.

Judgment is reversed, and no new trial granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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RICHARDSON v. DETROIT & MACKINAC RAILWAY CO.

1. RAILROADS—NEGLIGENCE—SPEED—TRAINS—OPERATION.

Evidence that defendant's extra train passed through a station on its line about midnight, running at from 30 to 40 miles an hour, striking and killing decedent, who was waiting for a passenger train, that the night was dark and misty and no headlight was displayed, although two lanterns were placed on the rear of the engine which was running backward, that there was no light at the station or in the yard, and that decedent was found in such a position as to permit of the inference that she was standing beside the track when the train struck her, with testimony in defendant's behalf tending to contradict plaintiff's claims as to speed and the failure to give statutory signals, warranted the trial court in submitting to the jury the question of defendant's negligent operation of the train.[1]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Considering her conduct in the light of the presumption that the deceased was in the exercise of reasonable care, testimony that the lights on the advancing train might easily have been mistaken for switch lights, that greasy spots were discovered on her clothing which might have been caused by catching in the machinery, and the condition of her clothing as well as the injuries found on the body were consistent with the theory that she was not on the track, the evidence presented a question of contributory negligence for the jury.

3. SAME—CAUSE OF DEATH.

Whether the extra train which passed through the station just before midnight caused the death of decedent, under evidence tending to show that it passed at 11:50 p. m.

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[1] As to running train or car between standing train and station, see notes in 13 L. R. A. (N. S.) 620; 27 L. R. A. (N. S.) 128; and 31 L. R. A. (N. S.) 338.

Upon the carrier's duty to prevent passengers at stations from going into dangerous places, see note in 32 L. R. A. (N. S.) 198. And for the degree of care toward passenger at station, see note in 33 L. R. A. (N. S.) 855.

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and that the watch of deceased stopped at that hour, was a question of fact, in connection with other testimony tending to show the body was cold when the regular train arrived.

4. SAME—LIGHTS—STATION.

It was as favorable to defendant as the evidence warranted, for the trial judge to eliminate from the issues the claim that the station was not properly lighted, on the theory that deceased had waived such requirement; defendant had no reason to complain of instructions leaving the failure to provide lights as one of the conditions surrounding the accident to the jury, as bearing on the question of negligent operation of the train.

5. DAMAGES—DEATH ACT—NEGLIGENCE.

Under 2 Comp. Laws, § 6309 (3 How. Stat. [2d Ed.] § 6664), providing that the amount recovered in an action for the killing of an intestate person shall be distributed to the persons and in the proportions provided in the law governing the distribution of personal property of intestates, a sister of decedent, whose father and mother were living at the date of decease, not being entitled to share in the estate, would not be entitled to consideration, although the surviving sister was an invalid, dependent on the decedent: the court committed prejudicial error in permitting the jury to base the damages awarded on the loss to father, mother, and sister.

6. SAME—ACTIONS—INDIGENT PARENTS—POOR LAW.

Plaintiff's right to recover was not defeated by the fact that decedent voluntarily contributed to the support of her infirm and aged parents, and that no steps had been taken to compel contribution under 2 Comp. Laws, § 4487 *et seq.* (2 How. Stat. [2d Ed.] § 3478 *et seq.*).

Error to Arenac; Sharpe, J. Submitted June 18, 1913. (Docket No. 45.) Decided July 9, 1913.

Case by Wallace B. Richardson as administrator of the estate of Edith I. Barhite, deceased, against the Detroit & Mackinac Railway Company for the negligent killing of decedent. Judgment for plaintiff. Defendant brings error. Reversed.

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Henry, Henry & Henry (James McNamara, of counsel), for appellant.

B. J. Henderson and *Hall & De Foe,* for appellee.

STONE, J. This is an action on the case brought by the administrator of the estate of Edith I. Barhite, deceased, against the defendant to recover damages under sections 6308 and 6309, 2 Comp. Laws (3 How. Stat. [2d Ed.] §§ 6663 and 6664). It is alleged that plaintiff's decedent met her death through the negligence of the defendant in the operation of one of its trains. From a judgment in favor of the plaintiff rendered in the circuit court for the county of Arenac, the case is brought to this court for review upon writ of error.

The plaintiff's intestate was an unmarried woman 37 years old at the time of her death. For 20 years she had been teaching school in different places in Michigan. In June, 1911, she had just finished teaching a term in Maple Ridge, Arenac county, and had left intending to go to Hillman, Montmorency county. The defendant operates a railroad from Bay City on the southerly, to Cheboygan its northern terminal through the village of Turner, in Arenac county, at which place a depot and depot grounds are maintained by the defendant. Turner at the time referred to herein was a village of between 400 and 500 inhabitants. In describing the general situation of the buildings and tracks in Turner reference is had to the attached map.

The main line of the defendant's road runs northeasterly and southwesterly through the village. Main street runs east and west. On the south side of Main street, 139 feet east of the main line, is the hotel in which plaintiff's decedent spent the evening of the night she met her death. On June 22, 1911, plaintiff's decedent was brought from Maple Ridge to Tur-

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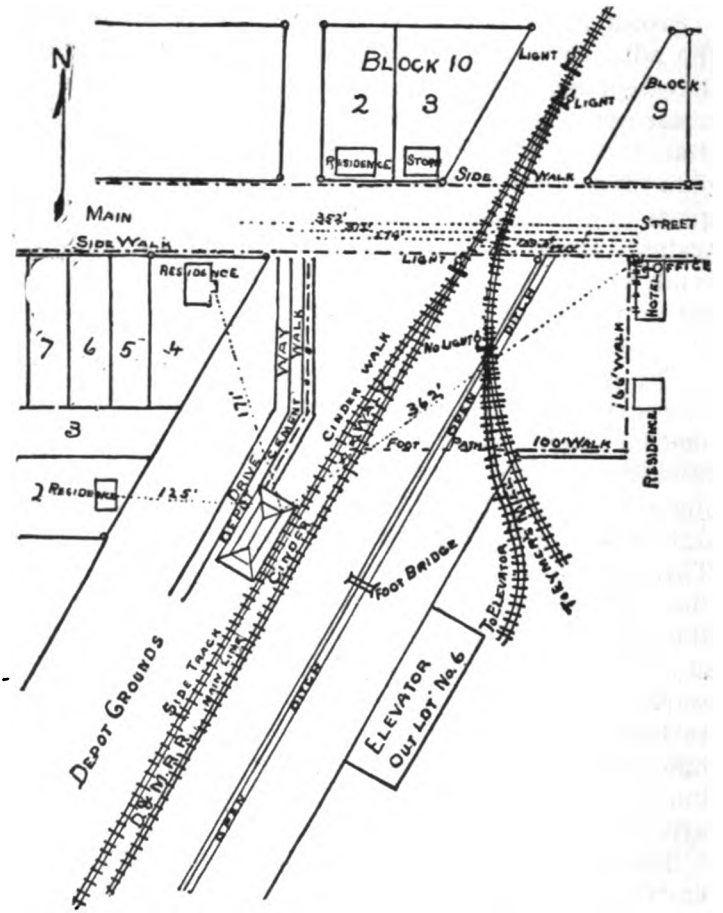
ner, arriving there about 9:30 p. m. local time. She first went to the depot and left a trunk on the west side thereof. After visiting a store, she went to the Turner Hotel. It was her intention to take the 12:14



a. m. No. 9 train north. She was given permission to remain in the hotel until train time, and she told the proprietor that she did not want any one to stay up with her; that she had taken the train before from Turner, and needed no assistance. She was last

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seen lying on a couch in the sitting room of the hotel about 10:15 p. m. The defendant's local station agent saw and talked with Miss Barhite that evening at the hotel. She said that she wished to go to Alpena, and he explained to her what she should do to see that her trunk was put aboard the train, and he offered to wire North Bay City in reference to it, but she said it was not necessary. He gave her the correct time, and saw that her watch was right. He offered to light the depot and leave it open for her, but she said she preferred to remain at the hotel.

On the night in question passenger train No. 9 left Bay City, according to the train sheet, at 11:25. It was late, and did not arrive at Turner until 1:10 a. m. On the night in question, Engineer Gurly, then at Bay City, received orders to back up to Sagining, about 25 miles north of Bay City, and at that point to change engines with a passenger train going south drawn by engine No. 24. The engines were exchanged, and Gurly in charge of engine 24 proceeded north towards East Tawas passing through Turner. This engine had a broken back-up eccentric strap on the left side, but this in no way affected the running of the engine. Extra 24, as this train was known, comprised engine No. 24 and tender and a baggage car. The engine was headed south, and the baggage car was coupled to the front end of the engine. The train, therefore, stood so that the tender of the engine was to the north and the baggage car to the south. Extra 24 in this position backed north toward East Tawas. A red light and a white light hung on the advancing end of the tender. There was no headlight on that end. A lighted headlight shone to the south, and into the baggage car which was coupled to the engine. This train left Sagining for East Tawas about 10:45 p. m. Engine 24 carried an automatic bell, and there was testimony that it was ringing throughout the run,

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and as it passed through Turner. There was also testimony that as the train approached Turner the engineer blew one long whistle, and when within 500 or 600 feet of the depot he blew another crossing whistle. There was a conflict in the testimony as to the time and rate of speed at which extra 24 passed through Turner; the plaintiff claiming that it ran at from 30 to 40 miles an hour, and that it passed through there at 11:50 p. m., while the defendant claimed that it ran through Turner at a speed of from 18 to 20 miles an hour, and at 11:10 p. m. All agree that none of the crew on this train noticed anything unusual in passing through Turner, and nobody had any knowledge of running into or over any person or thing. Freight train No. 17 left North Bay City at 9:17 that evening for the north. The train was a regular one, and comprised 55 freight cars. It passed through Turner that night about 12:14 a. m. at a speed of about 20 miles an hour. The headlight on this train was burning and in good condition. That train crew had no knowledge of running into any one.

The baggageman on the passenger train, which arrived at 1:10 a. m., alighted and was the first person to discover the body of Miss Barhite. A box car stood on the westerly side track, the south end of which was from 50 to 70 feet north of the north end of the depot. The baggageman jumped from a door in the baggage car, which was near the south end of the box car. The body was about three feet north of the door of the baggage car, about the middle of the box car. Miss Barhite's watch first attracted the attention of the baggageman. It was at his feet as he jumped from the car. It had stopped at 11:50. The body was three or four feet north of the watch, lying about two feet from the rail of the main track between the baggage car and the box car. One limb had been carried up the track, and was four or five rods north of the body.

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One or two books were found north of the box car. The body was found lying face down, and parallel to, and about two feet from, the main track. There were no electric lights in Turner in the vicinity of the depot, and the station was not lighted. It had not been customary for the defendant to keep its agents at its stations along the line north of Bay City after the evening train went south, which was due to arrive in Bay City at 9:30 p. m. No one saw plaintiff's decedent at the time of the accident whereby she met her death. Upon the trial of the case the jury rendered a verdict in favor of the plaintiff for $3,000.

Under the errors assigned the appellant has discussed the questions involved under the following heads:

(1) No negligence can be imputed to defendant as a matter of law.

(2) The negligence of plaintiff's intestate so contributed to her death as to bar any recovery as matter of law.

(3) The cause of the death of the plaintiff was speculative and conjectural, and should not have been left to the jury.

(4) The fact that the station was not open and lighted was not the proximate cause of the death of plaintiff's intestate, and should not have been left to the jury in connection with any question whatever.

(5) The court erred in instructing the jury respecting intestate's duty to her parents and sister, and contributions to them.

(6) The court erred in refusing to instruct the jury as requested by defendant's counsel.

(7) The trial court erred in denying defendant's motion for a new trial.

Before discussing the assignments of error, it may be well to state that three special questions were submitted to the jury by defendant's counsel. They were as follows:

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"(1) Was extra train with engine No. 24 going north, with Chambers, conductor, Gurly, engineer, Luce, fireman, and La Barge, brakeman, on the night of June 22, 1911, equipped with one or more lights on the northerly and advancing end of the tender as it passed through Turner?"

This question was, by consent of plaintiff's counsel, answered in the affirmative.

"(2) Did Engineer Gurly, of above extra, blow his whistle on approaching Turner?"

To which the jury answered: "Yes."

"(3) Was there an automatic bell ringing on above engine as it passed through Turner?"

This question the jury answered: "Yes."

1. It is the claim of defendant that there was no evidence of negligence on its part in the operation of this train, extra No. 24. The jury found, and the plaintiff conceded, that there were two lights burning on the northerly or advancing end of this train. These were both ordinary railroad lanterns, and there is testimony that they looked about the same as ordinary switch lights. The jury also found, as we have shown, that the whistle was blown on approaching Turner, and that the automatic bell was ringing, and the evidence on this question need not be referred to. Under this head, the important question is whether there was any evidence of negligence on the part of the defendant in its manner of operating the train through Turner in the condition it was.

The trial court submitted the case to the jury on the question as to whether or not the train was operated at an excessive rate of speed in view of the conditions as to lights, the darkness of the night, and the conditions surrounding the station, saying:

"I am going to submit that question to you to say, in view of the way in which this train was operated

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at that time, whether or not they ran it at an excessive rate of speed."

As we have already said, there was a sharp conflict in the evidence as to the rate of speed at which the train was run through Turner. It is the contention of the defendant that the rate of speed was immaterial; that if it complied with its rules relative to the proper lighting of its train, if it blew the statutory whistles, and if it properly caused its bell to ring, it could operate its engine at any speed it saw fit in going from Sagining to East Tawas on the night in question. It was testified to by the train crew that the defect in the engine did not retard its speed, that it was capable of running better than a mile a minute, and that the average rate of speed in making the run from Sagining to East Tawas was 37 to 38 miles an hour. A careful reading of this record has satisfied us that the rate of speed of this train was a material question, and that it was properly submitted to the jury. While it was probably not negligence to operate this engine backwards through Turner station, yet, considering the surroundings, all agreeing that it was a dark, misty night, that the station and yard were unlighted, that the train was lighted by lanterns—all these raised a question for the jury. Certainly, in the light of the evidence, it would be an unusual thing to run a train backward, without a headlight by a station at a rate of speed from 30 to 40 miles an hour.

It is the claim of the defendant in this case that it was necessary to back this engine to East Tawas. Perhaps it would be more correct to say that it was a matter of convenience, as the record shows that the engine could have been run to North Bay City, a distance of about 25 miles, and there turned around and run to East Tawas in the usual manner. Most certainly we can say that there was evidence of an undue and unusual rate of speed, which, under the

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circumstances, raised a question for the jury. *Line* v. *Railway Co.*, 143 Mich. 163 (106 N. W. 719); *Gorton* v. *Harmon*, 152 Mich. 473 (116 N. W. 443, 15 Am. & Eng. Ann. Cas. 461); *Morgan* v. *Railroad Co.*, 162 Mich. 573 (127 N. W. 683); *Schremms* v. *Railroad Co.*, 145 Mich. 190 (108 N. W. 698, 116 Am. St. Rep. 291); *Canerdy* v. *Railway Co.*, 156 Mich. 211 (120 N. W. 582); *Garran* v. *Railroad Co.*, 144 Mich. 26 (107 N. W. 284); *Monroe* v. *Railway Co.*, 129 Mich. 309 (88 N. W. 888); *Van Auken* v. *Railway Co.*, 96 Mich. 307 (55 N. W. 971, 22 L. R. A. 33).

2. Was the plaintiff's decedent, as matter of law, guilty of contributory negligence? This question was submitted to the jury by the learned trial judge. The decedent is not here to give us her version of the transaction. In the absence of her testimony, the presumption is that she was in the exercise of due care. We have examined the cases cited by appellant, and do not think they are controlling of this question. The proximity and relation of the box car to the main track, the darkness of the night, and the readiness with which the lights upon the approaching train might have been mistaken for switch lights in the yard, peculiarly raise a question for the jury upon this subject.

We gather from the record that plaintiff's decedent had probably reached the depot, and had removed her trunk from the west side of the building, where she had previously left it, to the northeast corner of the platform, two or three feet from the corner of the building, where it was found after the accident. This tends to show that she was probably expecting a train, and may have mistaken the train by which she was killed for the regular passenger train. It would seem, also, from the evidence that, had she been upon the track and struck by the square end of the tender, both the body and the articles found would probably have

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been found upon the main track. The undisputed evidence shows that the track was examined, and no evidence of blood was found thereon. One witness testified there was "nothing indicating where she was struck or where any portion of her body had been on the rail underneath the wheels," making it quite evident that her limb was not severed by being run over by the engine, the evidence showing that it had been carried some distance by the engine. The doctor who examined the body detailed at great length the condition of it, and of the clothing, and described the greasy spots or streaks on her clothing, indicating that the same may have come in contact with the machinery of the engine while she was standing opposite it. There is also evidence of the undertaker who examined the premises the next morning. He found some of the deceased's hair on the framework of the bottom of the box car about the center of the car, and some of her teeth underneath on the ground. The conclusion to be drawn from this testimony was in our opinion one for the jury. It is quite probable that the engine and car unexpectedly rushed by, taking plaintiff's decedent unawares while she was looking for her train.

If this train was running at the rate of speed claimed for it by plaintiff's witnesses, it is apparent that the suction from the rapid motion of the train may have drawn the skirts of decedent into the driving wheel, or machinery, causing the marks or grease spots described upon her clothing, and tearing her clothing from her hips, and winding it around her feet, as described by the doctor. This might draw her legs into the machinery, and may have severed the one and broken the other, as described. Under the evidence, we are of the opinion that the question of contributory negligence, especially in view of the presumption that she was in the exercise of due care,

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was properly left to the jury. *Staal* v. *Railroad Co.*, 57 Mich. 239 (23 N. W. 795); *Underhill* v. *Railway Co.*, 81 Mich. 43 (45 N. W. 508); *Mynning* v. *Railroad Co.*, 64 Mich. 93 (31 N. W. 147, 8 Am. St. Rep. 804); *Schremms* v. *Railroad Co., supra.*

3. Was the cause of death conjectural? It is claimed by defendant that the verdict was conjectural, both as to the negligence of the defendant and the contributory negligence of the plaintiff's decedent. It is also claimed that no testimony in the case warrants the legitimate inference that it was engine extra No. 24 that caused her death. It was conceded at the trial that decedent was killed by a train of defendant, and the court in its charge, referring to this concession, said:

"By the appearance it is apparent, and counsel for the defendant concede, that she was in some way killed by coming in contact with one of the trains of the defendant company."

The open question is, therefore, whether there was any evidence upon which the jury could find that her death was caused by engine No. 24. The testimony, including the circumstance of the watch stopping at 11:50, tends to show that a north-bound train passed through Turner that night before 12 o'clock, and that that train was extra No. 24. It is undisputed that the through freight passed at 12:14 a. m., and the regular passenger train at 1:10 a. m., about one hour behind its schedule time. In all probability the deceased was not struck by the regular passenger train, because the body was found by the baggageman and passengers immediately after the train had stopped, and the testimony shows that the body was then cold, the doctor testifying that death was only recent, "within an hour or two at least." When the freight train passed through Turner, it is undisputed that the headlight was burning and threw a reflection down

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the track 300 or 400 feet. The engineer and fireman were in their proper places, and both testify that they saw nothing unusual. We think that the evidence presented a question for the jury. In our opinion the instant case is clearly distinguishable from those involving two possible causes of an accident, one of which would charge the defendant with negligence and the other would not.

4. The question is raised whether lights were kept at this station in compliance with the provisions of section 13*a* of Act No. 300, Pub. Acts 1909 (3 How. Stat. [2d Ed.] § 6536). The trial court eliminated this question from the consideration of the jury upon the ground of waiver by plaintiff's decedent; and therefore it is not necessary to discuss it here. The jury were permitted to consider the appearance of the premises only in connection with the degree of care to be exercised by the train crew in backing its engine by the station without a headlight. It seems to have been submitted for their consideration the same as any other fact relating to the surrounding conditions, such as the location of the station, the position of the box car, the view of the track, etc. The charge was so favorable to the defendant upon this branch of the case that it cannot here be complained of.

5. The measure of damages. It is claimed by appellant that the court erred in instructing the jury respecting intestate's duty to her parents and sister, and contributions to them. The only testimony in the case relative to intestate's contributions to her parents and sister was given by Lillian M. Richardson, sister, and William A. Barhite, the father. The intestate was 37 years of age at the time of her death, a school teacher earning a salary of $60 per month, teaching a country school, and she also had conducted a normal school at Hillman. Her father was 70 years

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of age, in poor health, her mother was 61 years of age, and had been an invalid for years, and her sister, Myrtle, was an invalid 36 years of age. The sister testified that plaintiff's decedent had been contributing $40 per month during the school year of nine months, and for the other three months she contributed $15 or $20. Both intestate's sister and father testified that she had contributed to the support of her father, mother, and sister for 20 years before her death. There was no evidence that the parents and invalid sister were indigent and dependent upon the public for support; nor did the testimony show that, had intestate not rendered the support she did, they would have become a burden upon the public.

The learned trial judge, in charging the jury with respect to the damages plaintiff was entitled to in case of a verdict in his favor, used the following language, which has been made the basis of assignments of error:

"Evidence has been submitted here that she was in the habit during her lifetime of contributing to the support of her father and mother and sister, and that those people have lost by her death. Now, if they have, the law permits a recovery for it. It is the duty of a child, I don't care how old they are—this girl was about 36 or 37 years old—it is their duty if they have a father or mother that is getting old, or an infirm sister, it is their duty under the law to aid them. And this girl, if she was doing that, deserves a great deal of credit for it. And, if you find that they lost money on account of her death in their means of support, then the law requires this company to compensate them for it, providing, as I say, that you find that they are liable under the instructions that I have given you. * * *"

"The law, of course, is to compensate, to make good; it is not to punish anybody. The purpose of this case is simply to give compensation to the father and mother and sister for the loss that they have sustained financially because they have lost a daughter

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or sister. You are not punishing the company; you are not to give them damages on account of their feelings or anything of that kind, but simply because they have lost money. Their claim is that she contributed and gave them something towards their support and maintenance every year, and they are not going to get that any more; they need it for their support and maintenance. If you find that is true, the plaintiff is entitled to recover for their use and benefit such sum as you find will compensate them for that loss."

"Now, you have heard the evidence as to the age of the father and as to the age of the mother and as to the age of the sister. You have heard that they are all infirm and all ill. Now, you should take that into consideration. They are not entitled to recover anything, of course, after their death. They are only entitled to recover such sums as they would have lost during their lifetime. You should exercise the utmost good care in estimating that amount, because all you can do is estimate it."

"Another thing about it: Had she lived, she would have paid them those sums of money every year—as a matter of law we figure them up by the year as a rule. Now, you are going to give them such sum as you allow in a lump sum. * * *"

"Now, gentlemen of the jury, your verdict in this case, if you find for the plaintiff, if you find that he is entitled to recover, will be such damages, as I have said, as you may find will compensate these relatives for the financial loss that they have sustained by reason of the death of this daughter and sister, under the instructions I have given you."

Section 6309, 2 Comp. Laws (3 How. Stat. [2d Ed.] § 6664), reads as follows:

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons, and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and

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just, to the persons who may be entitled to such damages when recovered."

This court held in *Van Brunt* v. *Railroad Co.*, 78 Mich. 530 (44 N. W. 321), that under this statute and the preceding section none of the next of kin could recover unless they showed a pecuniary loss on account of the person killed; and if, as in that case, the proof showed no person pecuniarily injured by the death of plaintiff's intestate, there could be no recovery. It will be noted that in the section above quoted it is provided that—

"The amount recovered in any such action shall be distributed to the persons, and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate."

Under the provisions of Act No. 116 of the Public Acts of 1899 (4 How. Stat. [2d Ed.] § 11038), providing for the distribution of the estates of intestates, it is provided that the residue of personal estates shall be distributed in the same proportions, and to the same persons, and for the same purposes, as prescribed for the descent and disposition of real estate. And by Act No. 286, Pub. Acts 1909 (4 How. Stat. [2d Ed.] § 10959), it is provided that if the intestate shall leave no issue, husband or widow, his or her real estate shall descend to the father and mother in equal shares, and, if there be but one of the parents living, then to the survivor alone. We have looked in vain for any authority to support that part of the charge of the court referring to the legal duty of plaintiff's decedent to aid in the support of her sister. There is nothing in the statute relating to the support of poor persons by their relatives, requiring a person to support his brothers or sisters.

In *Richmond* v. *Railway Co.*, 87 Mich. 374 (49 N. W. 621), this court held that in an action against a railroad company, under the statute above quoted, for

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the negligent killing of plaintiff's intestate, the damages were limited to the pecuniary injuries sustained by the persons entitled to share in the distribution of his personal estate, which distribution was governed by the statute existing at the time of the death of the intestate. In that case the deceased was an unmarried man, and his next of kin consisted of his mother and two brothers and two sisters. The deceased lived with his mother, as did his sister, Ella, who was an invalid. He was 30 years of age at the time of his death. He had contributed to the support of the family. The court instructed the jury as follows:

"If you find the plaintiff entitled to recover, he is entitled to recover damages to the extent of the pecuniary loss which the mother and next of kin of the deceased, Mr. Sherwood, have sustained by his death. This amount will be such an amount as the jury are able to say it is reasonably probable would have been contributed by the deceased to their support had he lived. The jury cannot go beyond the term of the expectancy of life of the deceased, which is shown by the tables to have been 35.33 years, and, in weighing the testimony as to the contributions which would have been likely to have been made to the mother of the deceased, the jury cannot extend these beyond the period of her expectancy of life, which is shown by the tables to have been 18.79 years. As to the testimony of contributions to the sister, these cannot be considered, except for the period after the probable decease of the mother, and, under the testimony, such contributions are said to have been included in the sum which was contributed to the family."

Justice MORSE, speaking for a majority of the court, held that under the holding in the *Van Brunt Case* damages in the case under consideration could only be recovered on account of the mother and sister Ella, as no pecuniary injury was shown as to the others by Sherwood's death; that the circuit court so limited it, and was correct in allowing no damages

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to be computed on account of the sister until after the mother's death, as, under the testimony, these contributions to the sister were included in the contributions to the family. In that case it is worthy of note that the statute in force at the time of Sherwood's death differed from the present statute, in that it provided that the property in such a case as the one then under consideration should descend one-half to his mother, and the remainder in equal shares to the brothers and sisters. This difference makes the distinction between the two cases, and shows that in the instant case it was error to submit to the jury the question as to the contributions made to, or on behalf of, the sister. It has been frequently held in this State that the compensation provided by the statute is strictly pecuniary, and there can only be recovery for the benefit of the next of kin who are within the rule of distribution already alluded to.

Under the death act the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from the death, to the beneficiaries. Tiffany's Death by Wrongful Act (2d Ed.), p. 300. In *Rouse* v. *Railway*, 128 Mich. 149, 155 (87 N. W. 68, 70), it was said:

"The statute does not imply that damages and pecuniary loss necessarily flow from the negligent killing. * * * These damages must be limited to the pecuniary damage sustained by those legally entitled to support."

See, also, *Chicago, etc., R. Co.* v. *Bayfield*, 37 Mich. 205; *Cooper* v. *Railway Co.*, 66 Mich. 261 (33 N. W. 306, 11 Am. St. Rep. 482); *Staal* v. *Railroad Co.*, *supra; Balch* v. *Railroad Co.*, 67 Mich. 394 (34 N. W. 884). Commendable as it may have been, had plaintiff's decedent been supporting or educating a niece or some other collateral relative and contributing annually for such purpose, it would hardly be

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claimed that such person could be a beneficiary in the action brought by virtue of the statute in question. And this is just the difficulty that confronts us in this part of the charge. For such voluntary contributions as plaintiff's intestate saw fit to make to her sister there can be no cause of action or right of recovery. In the case of *Schadewald, Adm'r,* v. *Railway Co.,* 55 Wis. 569 (13 N. W. 458), an action was brought under a similar statute. The right of action, however, was there by statute for the benefit of the surviving husband or wife of the deceased. It was there held that in an action to recover damages in respect to the death of a person caused by the wrongful act or neglect of another, if the widow survive the deceased, the damages sustained by her alone are all that can be recovered under the statute. In that case the plaintiff in his declaration claimed damages to the widow and children of the deceased resulting from his death; and the jury there, as here, were instructed that such damages were recoverable in the action. The supreme court of Wisconsin said:

"This was error. Damages sustained by the widow alone are all that can be recovered under the statute."

See, also, *Regan, Adm'r,* v. *Railway,* 51 Wis. 599 (8 N. W. 292); Tiffany, Death by Wrongful Act, § 168 *et seq.*

We cannot agree with appellant's counsel that there can be no recovery in this case in so far as the father and mother are concerned, because action had not been taken under chapter 110, 2 Comp. Laws (2 How. Stat. [2d Ed.] § 3478 *et seq.*), relating to the support of poor persons by their relatives. Our attention has been called to the cases of *Clinton* v. *Laning,* 61 Mich. 355 (28 N. W. 125), and *Schwanz* v. *Wujek,* 163 Mich. 492 (128 N. W. 731). *Clinton* v. *Laning* was an action brought by a father in advanced years to recover damages from the defendants for his loss

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by being compelled to support a grown-up son who, being given to drinking, became grossly drunk at defendant's tavern, and on his way home had his feet and hand badly frozen so as to render him to a great degree helpless. There, although no statutory proceedings had been taken, the father had been supporting the son, and Chief Justice CAMPBELL said:

"We think that the voluntary assumption of this duty may fairly be regarded as performing a legal obligation, and that expenditures to a proper extent, within the limit which could be laid down by compulsion, are as valid charges as if they had been compelled, and may be considered as on a similar footing.

"But in making these outlays voluntarily, nothing can fairly be included as a payment by obligation beyond what might have been reasonably required in case of refusal."

And he proceeds to show that that rule had not been observed in that case. The fact, if it be a fact, that plaintiff's decedent voluntarily assumed the performance of a duty which might be regarded as a legal obligation, and made expenditures to a proper extent, might form a basis for a recovery in this action in so far as the father and mother are concerned. We think the instant case can readily be distinguished from *Schwanz* v. *Wujek, supra,* where an action was brought against a son to recover for an operation performed upon his father, in which the son had no part.

For the error pointed out in the charge relating to the claimed legal duty of the plaintiff's intestate to her sister, and her contributions to the sister, as a basis of recovery in this case, we feel constrained to reverse the judgment of the circuit court. While there is no complaint urged here that the judgment is excessive, yet it is properly urged and claimed in the motion for a new trial, and covered by proper assignments of error, that the whole basis of the measure

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of damages was erroneously given to the jury; and we cannot say that the error has not affected the judgment; nor are we able to state the amount the judgment has been enhanced by this erroneous part of the charge.

Judgment reversed, and a new trial ordered.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

WATKINS v. BURDICK.

LOGS AND LOGGING—MERCHANTABLE SCALE—CONTRACTS—FRAUD.

Evidence that plaintiff contracted with defendant to cut and remove from plaintiff's land a quantity of inferior, culled, and fallen or "down" timber, and paid defendant for the number of feet scaled by him, which plaintiff claimed was excessive and fraudulent, that plaintiff saw most of the timber that defendant hauled out before making the final payment and defendant testified that he did not agree to cull the timber and scaled it correctly, according to his best judgment, was insufficient to present a question of fraud for the jury, and the trial court committed no error in refusing to apply the rule of "merchantable scale" to the transaction.

Error to Houghton; Streeter, J. Submitted June 24, 1913. (Docket No. 132.) Decided July 9, 1913.

Case by John Watkins against Eugene L. Burdick for money obtained by misrepresentation. Judgment

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for defendant upon a directed verdict. Plaintiff brings error. Affirmed.

O'Brien & Le Gendre, for appellant.

Burritt & Burritt, for appellee.

STONE, J. This case originated in justice's court. The cause of action is in case, to recover back from the defendant money paid to him by the plaintiff, under alleged false misrepresentations and fraud of the defendant. The declaration alleged that the plaintiff, being, in 1908, the owner of 80 acres of land in Houghton county, and being desirous of having cut and removed certain logs therefrom, entered into an agreement with defendant to pay him four cents per foot for hewing timber, and $10 per thousand feet for cutting and hauling logs therefrom; that defendant entered upon the performance of such agreement, and later the defendant fraudulently, falsely, and deceitfully represented to the plaintiff that he (the defendant) had hewed 2,424 feet of timber, and had cut and hauled 29,291 feet of logs for plaintiff, and that said above figures were the scale and measurement of the Worcester Lumber Company's scaler, P. W. Coffee, whereupon the plaintiff, believing said false representations, paid defendant for hewing the above amount of timber at four cents per foot, amounting to $96.96, and for cutting and hauling the above-stated amount of logs, at $10 per thousand feet, amounting to $292.91, whereas, in truth and in fact the amount of timber hewed by defendant for the plaintiff was 2,226 feet, and the actual amount of logs cut and hauled by defendant for plaintiff was 21,262 feet, and whereas, in fact the said flat timber and logs had never been scaled by said P. W. Coffee, or any other scaler. And the plaintiff averred that the defendant neglected and refused to pay back to the

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plaintiff $80.74, which plaintiff paid to said defendant in excess of the actual amount due said defendant for the work and labor performed for the plaintiff as above stated, and, with the wicked purpose of cheating and defrauding the plaintiff out of the benefit thereof, still wickedly retained and held the said sum of money, to the damage of the plaintiff.

The plea was the general issue. Upon the trial of the case in the circuit court it appeared that the timber which the defendant was to cut and get out was certain down hemlock timber that was left after the large standing timber had been sold and removed. The plaintiff testified as follows:

"I wanted this down timber hauled out. Down timber is timber that has fallen from the wind or getting old, it is mature, and it has dropped over. It is usually the wind that has blown it over, and that ground was possibly covered with heavy timber. There was considerable of that in the woods. I never estimated the timber, but we went over the ground together. It took us part of one afternoon, and pretty much all of the next forenoon, and as I relied upon him (the defendant), I thought he knew more about timber than I did, and we made a rough estimate of it. * * * We didn't arrive at an agreement that time. We went over the ground and we couldn't come to an agreement, not that day. We came to an agreement later on by letter."

We are not favored with a copy of this letter and are unable to determine just what the terms of the agreement were. It is undisputed that much of this down timber was worked up and hauled out by the defendant, and there is no claim that his statement of amount was incorrect, unless the rule of merchantable scale is to be applied. The plaintiff saw the timber that was hauled out, except a few pieces, before he made the final payment of upwards of $220. Plaintiff further testified that he never bound the defendant down to the timber being merchantable timber.

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Defendant testified that he went on under the agreement and hewed the timber and hauled it out, and that he measured and reported it correctly. It was undisputed that the down timber on the land had been cut over, before this cutting, by the Sturgeon River Lumber Company, and what was considered good had been taken out.

At the close of the testimony the court directed a verdict for the defendant upon the ground that the testimony as to damages was too vague and indefinite to warrant the submission of the case to the jury. The plaintiff has brought the case here and assigns as error that the court should have submitted the case to the jury, and erred in directing a verdict for the defendant.

An examination of the record shows that the evidence offered by the plaintiff was to the effect that by a "merchantable scale" the quantity of timber represented by the amount in controversy should have been rejected, and was rejected by certain scales made by competent scalers. We think that the timber cut and hauled by defendant was down, poor, hemlock timber which had been left on the land, and the evidence does not show any agreement that the defendant was to cull it, but he was to use his best judgment in selecting it; and there is no evidence tending to show that he did not exercise his best judgment in so doing. On the contrary, the evidence shows that he did exercise his best judgment, in cutting and scaling, and sent the correct statement of the amount gotten out by him in good faith. This was not a case of the sale of a quantity of "merchantable timber or logs" to the plaintiff, but a case where defendant was to cut and deliver to plaintiff a quantity of poor and inferior down timber belonging to plaintiff, which had already been culled over, and it was not a case for the application of the rule of a "merchantable scale."

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We think there was no evidence of fraud or misrepresentation in the case, and are of opinion that the circuit judge, in directing a verdict for the defendant, reached a correct conclusion, and the judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

NEWBERRY v. BOYNE CITY TANNING CO.

1. MASTER AND SERVANT—INSTRUCTIONS—OBVIOUS DANGER.
   Every normal, mature man must employ his senses in self-protection whenever there may be reasonable cause to apprehend danger, and must do all that an ordinarily prudent man ought to do under the circumstances, and while it is the master's duty to instruct a servant as to risks which may not be discovered in the exercise of ordinary caution, obvious risks or dangers are assumed by the servant.[1]

2. SAME—CONTRIBUTORY NEGLIGENCE—OBVIOUS RISKS.
   Where plaintiff was familiar with woodworking machinery as a result of long experience, and knew that adjustments of the machine he was using were required to be different for hard than for soft wood, he could not recover for injuries sustained in attempting to plane a piece of hard wood, without examining the adjustments of the

[1] As to the master's duty to warn or instruct servant, generally, see note in 44 L. R. A. 33. And as to the duty of a master to adopt rules to protect servant, or to warn him, against dangers not reasonably to be apprehended, see note in 21 L. R. A. (N. S.) 89.
On the question of assumption of obvious risks of hazardous employment, see note in 1 L. R. A. (N. S.) 272.

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planer, which were not in condition for the work he was attempting to perform, causing the piece to fly back and force plaintiff's hand on the knives.

Error to Otsego; Sharpe, J. Submitted October 9, 1912. (Docket No. 18.) Decided July 18, 1913.

Case by Stephen Newberry against the Boyne City Tanning Company for personal injuries. Judgment for plaintiff, and defendant brings error. Reversed without a new trial.

J. E. Converse, for appellant.

Hall & De Foe, for appellee.

MCALVAY, J. This case was brought by plaintiff against defendant, a Michigan corporation, to recover damages for personal injuries received while in its employ as a carpenter, which injuries were claimed to have been caused by the negligence of defendant, its officers, and agents.

Plaintiff was 56 years of age and a carpenter by trade, at which he had worked 25 or 30 years. He was first employed in August, 1909, by defendant company piling tanbark, at which work he continued for three weeks. When it became known that he was a carpenter he was employed as such in and about the plant. The defendant company, among its various departments, maintained a machine shop, containing many machines for the use of its employees for doing such rebuilding and repair work as might be necessary. In this machine shop is a buzz planer or jointer of the ordinary standard type. This is a heavy machine made of metal 2 feet 10 inches high, with a table or top which is divided into two parts, known as "head board" and "tail board." These two parts are each 22 inches in width and 4 feet long. Between and under them revolves upon a shaft a cylinder head

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4 or 5 inches square, which carries two knives running the entire width of the table, and which are adjusted by the use of set screws and can be taken out. The two tables are also adjustable. The head table, being the one nearest the operator, is adjusted by the use of a crank screw, which is used for the purpose of raising or lowering this half of the table and regulating the depth of the desired cut or thickness of the shaving to be taken off from the wood to be planed or jointed. The tail board, or back half of the table, can also be adjusted by a jamb screw, and should be kept level with the machine knives. It is used only for the purpose of supporting the material being put through the machine which has passed over the knives. To operate this machine properly the head table should be adjusted to the thickness of the cut desired, and the material to be planed is then put upon the head table and passed over the knives in the cylinder head, which revolves toward the operator at great speed, planing the underside of the board or other piece of wood which is being put through the machine.

The machine in question had no regular operator employed by defendant. It was used by the mechanics about the plant whenever they had any work requiring its use. In the course of his work as a carpenter plaintiff was required to use this buzz planer, and had used it from October 1, 1909, on the average of once each day up to January 3, 1910, when this injury occurred. On this day he was directed by the master mechanic of defendant company to make certain wedges for use in the tannery 20 inches long, 7 inches wide, and 3 inches thick at one end, tapering down to ½ or ¾ inch at the other, the wedge part to be on the flat side of the stick. For this purpose plaintiff procured a well-seasoned piece of hard maple, cut it into proper lengths for his wedges, and went to this machine and started it in motion. He placed one of the pieces on the head table of the planer, putting his

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left hand on the front end of the stick and his right hand on the back end, and shoved it onto the planer knives. About 6 or 8 inches of the block had passed over the knives when it was suddenly forced back, causing plaintiff's left hand to drop onto the knives of the planer, which cut out the palm of his hand. An examination made directly after this injury by two fellow employees of the plaintiff showed that the tail board of the machine was not level with the cut of the knife, but was about 1/16 of an inch lower than it should have been. They also found that one of the two knives was out of alignment with the other, that it had been driven down on the set screw, so that one end was 1/16 of an inch low, making the other end 1/16 of an inch high.

At the close of plaintiff's case defendant moved the court for a directed verdict on the ground that it was not shown that defendant was guilty of any negligence, and it appeared that the plaintiff was guilty of contributory negligence. This motion was denied. Defendant offered no evidence in the case. The case was submitted to the jury, which returned a verdict in favor of plaintiff, upon which a judgment was duly entered. The case is here upon a writ of error, and the error relied upon by the defendant is that the court should have instructed a verdict in its favor.

It appears from the record that it had been the practice for a long time in the machine shop for the employees of defendant who had occasion to use this machine to adjust it as might be necessary to the requirements of the work each was about to do upon it, and it also appears that the want of adjustment found by the men who examined the machine after plaintiff's injury would render it more dangerous in causing pieces of wood being put through to fly back. Both of these matters are eliminated from the case, and the only negligence charged and relied upon by

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plaintiff is the neglect of defendant to warn and instruct plaintiff when he was first put to work on this machine, as appears from the following statement in plaintiff's brief:

"Defendant is in error in stating in its brief that one of the grounds of negligence relied upon by plaintiff was that this machine was defective (Brief p. 7). There was no claim that the machine was defective any more than it was out of adjustment at the time of plaintiff's injury, and the lack of adjustment was not relied upon as a ground of actionable negligence. The case was tried and submitted on the theory that the plaintiff was a man without experience with or knowledge of such a machine, and that he was ordered to use this planer without being instructed as to the proper method of operating or adjusting it, and without warning of the dangers attendant upon its use in the manner in which it was then operated by the employees of defendant."

This, then, is the sole question to be determined in this case.

The record shows that the blacksmith shop, the carpenter shop, and machine shop were all in this building. The carpenter shop was in the end of the building next to the machine shop, and the bench upon which plaintiff worked in the shop was within 6 feet of this buzz planer, which was always in full view from his bench, and when his work required its use he could step to it readily. Plaintiff was a mature man in the full possession of all his faculties, and from his testimony appears to be of ordinary intelligence. During practically his entire manhood he had worked as a carpenter, principally engaged in building houses, and had been familiar with the use of tools in working wood by hand. He testified that he had not been familiar with the use of machinery before entering defendant's shop. The record shows that plaintiff had used other machines in the shop; that he had used this machine on the average of once

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a day for the three months before his injury, and had planed on it different kinds of wood, both soft and hard, which required different thicknesses of cut, and knew that the knives would kick back; that on the morning in question he made no examination of the machine before he began to operate it to determine whether it was properly adjusted for the work he was about to do; that he understood the machine was a dangerous one, and could have discovered for himself whether it was out of alignment; that he was warned not to use any machine if it was out of repair in any way, and that such a condition was to be reported, so that the machinists might make the necessary repairs and adjustments.

The foregoing, taken from plaintiff's testimony in the case, discloses his knowledge of and acquaintance with this machine on the day of his injury. Every normal, mature man is supposed to use his senses in self-protection whenever there may be reasonable cause to apprehend danger. He must do all that any ordinarily prudent man ought to do under any given circumstances. Baldwin on Personal Injuries (2d Ed.), § 134.

The rule is that it is the master's duty to instruct a servant as to risks which he will not discover by the exercise of ordinary care, but when the servant is a mature man he assumes such risks as arise from obvious dangers. Baldwin on Personal Injuries (2d Ed.), § 347.

It is apparent from the record that from the lifetime experience of plaintiff he was perfectly familiar with woodworking and the difference between hard and soft woods as to the necessity of adjusting the cut of the shavings, and that from his continued use of this machine he knew that the adjustments necessary for doing the work depended upon the character of the material used at the time. On the day of his injury, his testimony shows he made no examination

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of the adjustments of the machine, and did not use the care of an ordinarily prudent man under like circumstances. Whatever dangers there were about this machine were obvious and could have been discovered by plaintiff by the use of the care exercised by an ordinarily prudent man. These rules of law are so fundamental and have been so often announced by this court that citations are unnecessary.

The injury was the result of his own negligence, and not caused by reason of the want of instructions by defendant at the time he was employed to operate it how to operate and adjust the machine. We conclude, therefore, as a matter of law, that the trial court was in error in denying defendant's motion for a directed verdict.

The judgment of the circuit court is reversed, and judgment will be entered in this court for defendant.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

MAINE v. MULLIKEN.

1. COVENANTS—DEEDS—BUILDING RESTRICTIONS—VIOLATION.

Defendant obtained the title of lot J subject to a restriction that the premises should be used only for residence purposes, and no residence should be erected thereon of less value than $2,500. He commenced the construction of what he claimed was a barn, but caused machinery to be moved in and commenced to use the structure for business and manufacturing purposes. Defendant had no horse or automobile; but contended that he expected in

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the immediate future to make certain alterations so as to change the alleged barn into a four-family flat. The decree of the circuit court required defendant to remove the building in 90 days. *Held*, that the decree was too broad and should be modified so as to permit defendant to complete the building for residence purposes, if he should elect so to do, to be worth when completed not less than $2,500. MOORE and KUHN, JJ., dissenting.

2. DEEDS—RESTRICTIVE COVENANTS—INTERPRETATION.

If a building on property subject to building restrictions is of the required value, and is used for the purposes mentioned, it is not in violation of the restriction because it may be unsightly or offensive to the taste, or because its erection may tend to render adjacent property less valuable.

Appeal from Wayne; Codd, J. Submitted April 28, 1913. (Docket No. 124.) Decided July 18, 1913.

Bill by John Maine and others against Margaret K. Mulliken and Robert J. Davis for an injunction. From a decree for complainants, defendant Davis appeals. Modified and affirmed.

Lodge & Brown, for complainants.

Jay Fuller, for defendant Davis.

KUHN, J. *(dissenting)*. The complainants are the owners of lot K and the defendant Davis of lot J, which adjoin each other on the south side of Alger avenue between Woodward avenue and John R. street in the city of Detroit. There was no building restriction in the original plat of the lots, but in 1891 lot J was sold by its owner to H. G. Lewis; the deed containing the following restriction:

"Said second party hereby agrees not to build or cause to be built on said lot any building on front of said lot of less than $1,000 in value, the same to stand 15 feet from the front of said lot line."

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In 1895 Lewis conveyed the lot by deed to L. H. Weitz, containing the following restriction:

"Said lot shall be used for residence purposes only, and no residence shall hereafter be erected on said lot of less than $2,500 in value."

Weitz later conveyed the lot to Margaret K. Mulliken, and she conveyed it to defendant Davis, but these deeds contained no restrictions.

It appears that Alger avenue is about one mile north of the Grand boulevard and is in what is conceded to be one of the desirable residential sections of the city of Detroit. It is a street of attractive residences, and the residential character of the locality has always been maintained.

Complainants in 1906 erected upon lot K a double house costing about $8,000. On the front of lot J at the time of the purchase of the property by Davis there was a cottage worth $1,000, which had been built about 20 years previously. Defendant Davis is a manufacturer of screens and weather strips and previous to his purchase of lot J had maintained his residence and factory at No. 2361 Woodward avenue. When he left there he bought the buildings, tore them down, and used at least a part of the material in the construction upon lot J of the building involved in this controversy. It is the claim of complainants that they learned from the tenant who was occupying the house on lot J that Davis had told him of his purchase of the property and of his intention to erect a factory building on the rear thereof. Complainant Brown thereupon notified him in writing that he would not be permitted to use the property for any but residential purposes. No reply was made by Davis but in November, 1910, he obtained from the department of building of the city of Detroit a permit to erect a barn on the alley line, 28 feet wide, 50 feet in length, and 18 feet high. About a week later construction

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was commenced on this so-called barn, and on November 15, 1910, the bill of complaint in this case was filed, alleging that defendant was erecting a building not intended for use for residence purposes and not a necessary outbuilding therefor, but that the structure was being built for business purposes, to be used as a factory for defendant's business. An *ex parte* temporary injunction was obtained. Thereupon defendant Davis and his solicitor called upon the judge who granted the injunction and informed him that the purpose of defendant was to erect a barn. The court notified complainants' solicitor, who upon being told of defendant's claim consented to the dissolution of the injunction, and the building was completed. Defendant filed a sworn answer alleging that the building was to be a barn and was not intended for factory or business purposes.

The case was heard upon pleadings and proofs, and the circuit judge, after making a personal examination of the property, made findings in part as follows:

"It seems to me that the building erected upon the lots in question is built in violation of the restrictions which provide that no building shall be put upon the property in question for anything but residence purposes. The mere statement by any person that a certain structure is a barn does not make it so. In order to judge of that the court must take into consideration all the circumstances surrounding it. In the first place, the size of the structure, as compared with the size of the house and the size of the lot, 28 feet wide by 50 feet long and 18 feet high, is hardly the size or dimensions of a barn, as such, especially in that locality, and for the house in question upon this lot. When the defendant stated that he was going to build a barn up there, I do not think he had the intention of building a barn. The testimony shows that at the time he owned neither an automobile nor a horse or any other property which would need a building for the purposes for which a barn would naturally be built. The testimony also discloses that prior to the erection of

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this structure he was in business on Woodward avenue and had a shed or building adjacent thereto upon property which he did not own. These were used in the course of his business and for business purposes. When he gives up that property, he takes over the lumber in the so-called barn and buildings there and places it upon the property which he has bought on Alger avenue and erected, as is undisputed, the structure of the size mentioned. And the testimony shows that since that time he has used it for business purposes, or if not for business purposes direct for business in connection with that business. Now, the fact that it is denied that screens and window strips were manufactured there is not necessarily a denial that it was used for business purposes. Certain admissions to the effect that hereafter, after the building was constructed, two machines of the character used in his business were removed from the other plant, or anyway removed and placed in this structure, has its effect in determining the cause of this building being erected. It shows that it was the intention of the defendant at that time to have this building for business purposes. Thereafter, after this injunction was served and dissolved by Judge Hosmer, he changes the plans or modifies them for the erection of a house, as he claims. This shows that the building was not at any time intended for a barn. It seems to me, under those circumstances, that, if this restriction against the use of this block for anything but residence purposes applies to this lot J, the plaintiff is entitled to the relief asked. * * * While the remedy may be a harsh one, no other adequate relief under the circumstances can be given to the complainants. The presence of this building manifestly erected for business purposes will necessarily continue to depreciate the value of the surrounding property, and especially the property of complainants. A decree as suggested by counsel for defendants perpetually enjoining them from using this for business purposes would not accomplish all that complainants under the circumstances are entitled to. Before commencing the work an injunction was served upon defendant Davis enjoining him from erecting any building for business purposes. On assurance to the court that only a barn would be erected, the injunction was

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dissolved; but, as I have already indicated in my previous finding, I believe from the testimony and an examination of the structure that it was never intended as such, and no one is to blame but the defendant himself for the necessity of this remedy. A decree may be entered accordingly."

His decree provides for the removal of the building by the defendant within 90 days and, in case of failure to comply with its terms, for a mandatory injunction to carry the decree into effect.

Complainants' proofs showed that two pieces of machinery were moved into the building and that in the fall of 1911 sounds of men and machinery at work were heard; that men were seen at work; and that men were seen coming to the factory and getting weather strips. Defendant admitted that at the time he built the structure he had no horse nor automobile to put in the barn but claims that it was his purpose after finishing the building to change it into a four-family flat and for that purpose consulted an architect and had the necessary drawings made. The position of the defendant in this cause is stated by his solicitor in his brief as follows:

"We have not attempted in this court, nor did we attempt at the trial, to show that this street was not a residential street. * * * Our contention in this case from first to last has been that we built nothing more nor less than a barn; that our permit was for a barn; that we have never used it for business purposes, and that we expect in the future to turn it into a four-family apartment for residence purposes; that none of the acts of defendant are in violation of the building restrictions on this lot."

The sole question presented is whether the circuit judge was warranted in making the findings he did and granting the relief provided for in the decree. We have before us photographs showing the appearance of the structure alleged to be a barn, and we are of the opinion that it was never the intention of the

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defendant Davis to use it for the purposes for which a barn is generally used. The size and appearance of the building is strongly corroborative of complainants' contention that its purpose was a business structure. It has a floor space of approximately 2,800 square feet, and it can reasonably be urged that such a structure would not naturally be erected in such a locality as an outbuilding on a 50-foot lot, and that it is entirely out of proportion to the cottage on the property or any proper residence building which might be built thereon. The effort to subsequently change it to a four-family flat was, we are convinced, a mere subterfuge resorted to for the purpose of preventing complainants from obtaining relief. He was notified of the restrictions before he commenced the construction, but notwithstanding that fact he went on and attempted to conceal his real purpose and accomplish what he knew he could not rightfully do. As was found by the circuit judge, the result was to depreciate the value of the surrounding property and especially that of complainants.

Complaint is made that the relief granted by the court works injustice in that it is a harsh remedy, and that a permanent injunction restraining business from being carried on on lot J would be sufficient to give complainants all the relief they are entitled to. With this we cannot agree. Being satisfied that the defendant is to blame for the situation in which he finds himself, we think the language used by the court in *Stewart* v. *Finkelstone,* 206 Mass. 28, 38 (92 N. E. 37, 40, 28 L. R. A. [N. S.] 634, 138 Am. St. Rep. 370), is appropriate:

"It is strongly urged that a mandatory injunction ought not to issue, for the reason that it would operate oppressively and inequitably, and impose on the defendant a loss disproportionate to the good it can accomplish, and that the plaintiffs ought to be relegated

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to financial compensation by way of damages. This remedy is a drastic one, and ought to be applied with caution, but in cases proper for its exercise, it ought not to be withheld merely for the reason that it will cause pecuniary loss. It has been found that the defendant with full knowledge of the restrictions 'deliberately attempted' to override them, and thus to deprive the district of the character given it by the restrictions. He took his chances as to the effect of his conduct with eyes open to the results which might ensue. It has been the practice of courts to issue mandatory injunctions upon similar facts. *Codman* v. *Bradley*, 201 Mass. 361, 369 [87 N. E. 591], and cases cited; *Curtis Manfg. Co.* v. *Wire Co.*, 203 Mass. 448 [89 N. E. 534, 133 Am. St. Rep. 307]; *Downey* v. *Hood & Sons*, 203 Mass. 4, 12 [89 N. E. 24]. Entrenchment behind considerable expenditures of money cannot shield premeditated efforts to evade or circumvent legal obligations from the salutary remedies of equity."

See, also, *McIlhinny* v. *Village of Trenton*, 148 Mich. 380 (111 N. W. 1083, 10 L. R. A. [N. S.] 623, 118 Am. St. Rep. 583, 12 Am. & Eng. Ann. Cas. 23); 22 Cyc. p. 742; *Meriwether* v. *Joy*, 85 Mo. App. 634; *Spilling* v. *Hutcheson*, 111 Va. 179 (68 S. E. 250); *Clark* v. *Martin*, 49 Pa. 289.

We are satisfied that the circuit judge, who saw and heard the witnesses in open court and who made a personal examination of the premises, reached the proper and equitable conclusion.

The decree should be affirmed, with costs.

MOORE, J., concurred with KUHN, J.

BROOKE, J. The relief granted complainants by the decree of the circuit court and affirmed by the opinion of my Brother KUHN not only goes far beyond the prayer for relief in the bill of complaint but enjoins defendant from using the structure in question in a manner not prohibited by the restrictive clause by which he is bound. Defendant must use lot J "for

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residence purposes only, and no residence shall hereafter be erected on said lot of less than $2,500 in value." Complainants are entitled to a decree permanently enjoining defendants from erecting any structure upon said lot J less than $2,500 in value; said structure to be used for residence purposes only. If the building in question when completed is worth $2,500 and is used for residence purposes only, there will be no breach of the restrictive clause, and complainants will have no legal grounds for complaint. They are not entitled to have the building demolished because it is unsightly or offensive to æsthetic taste, nor because its erection may have a tendency to render their property less valuable. Their rights must be measured solely by the terms of the restriction by which defendants are bound.

Defendant Davis is granted 90 days from the date of the entry of the decree in this court in which to make the building in question comply with the terms of the restriction. Complainants may apply to the court below to have said building removed in case of failure on the part of said Davis to so comply.

The decree of the court below will be modified in accordance with these views, and neither party will recover costs.

STEERE, C. J., and MCALVAY, STONE, OSTRANDER, and BIRD, JJ., concurred with BROOKE, J.

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McKNIGHT *v.* LOWITZ.

1. PARTNERSHIP—DISSOLUTION—PARTIES TO ACTION—SUIT BY ONE PARTNER.

   While a partner as assignee of the firm may bring an action in his own name as plaintiff for services rendered, he must allege and prove an assignment to himself in order to entitle him to recover after the dissolution of the firm.

2. SAME—ATTORNEY AND CLIENT—ASSIGNMENT—PARTIES.

   Services rendered by one member of a copartnership engaged in the practice of the law are presumed to constitute a partnership account, belonging to the firm: testimony of one partner that the account belonged to him, or of the other that he never had any interest in the account, and claimed none at the time, is insufficient to sustain an action in the name of the one partner, commenced after dissolution.

Error to Cass; Des Voignes, J. Submitted April 16, 1913. (Docket No. 78.) Decided July 18, 1913.

Assumpsit by William F. McKnight against Elick Lowitz for services rendered. Judgment for plaintiff. Defendant brings error. Reversed.

Carr & Eby and *Coy W. Hendryx (Gore & Harvey,* of counsel), for appellant.

Charles E. Sweet, for appellee.

BROOKE, J. Plaintiff brought suit to recover compensation for services as an attorney, claimed to have been rendered defendant at his request. He secured a judgment for $715, which defendant now reviews in this court by writ of error.

The first assignments of error discussed relate to

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the question of plaintiff's right to recover under his declaration. The bill of particulars shows that the charges against defendant are for services rendered during the latter part of August and the early part of September, 1910. Prior to about October 1, 1910, plaintiff was associated in the practice of the law with one James T. McAllister. The bill, as at first rendered, seems to have been upon the billhead of "McKnight & McAllister," but was accompanied by a letter signed by plaintiff personally, in which he said:

"Find herewith inclosed statement for services to date. Kindly send me check to cover same, and oblige."

These facts being developed upon plaintiff's cross-examination, a motion was made by defendant for a directed verdict upon the ground that no assignment from McKnight & McAllister to plaintiff had been pleaded or proven. This motion was denied, and upon redirect examination plaintiff testified that the account in question belonged to him. After judgment the deposition of James T. McAllister was taken and appended to a motion for a new trial. Many reasons were urged for the granting of a new trial, only one of which will be considered.

In various forms it is set up that the court erred in refusing to direct a verdict upon the ground that the proofs showed that the services, if rendered, were rendered by the firm of McKnight & McAllister, and that no assignment of the account had been pleaded or proven. It is, of course, elementary that an assignee in certain cases may sue in his own name, yet it is necessary for him to allege in his declaration an assignment and to prove the same upon the trial to entitle him to recover. *Draper* v. *Fletcher*, 26 Mich. 154; *Rose* v. *Jackson*, 40 Mich. 29; *Gates* v. *Comstock*, 107 Mich. 546 (65 N. W. 544).

We are of opinion that the services in question

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being legal in character and rendered at a time when plaintiff and McAllister were law partners, a presumption arises to the effect that the account is or was partnership property. We do not overlook the fact that the plaintiff upon redirect examination testified that the account belonged to him, nor the further fact that in his deposition Mr. McAllister testifies that he never has and does not now make any claim to this account. It is, of course, true that many law partnerships are so arranged that the individuals constituting the copartnership retain individual accounts to themselves. It is, however, significant that in the instant case neither the plaintiff nor Mr. McAllister, both trained lawyers, testify that this account belonged to that class. In the absence of such testimony it was incumbent upon plaintiff to both plead and prove an assignment from the copartnership to himself. A verdict should have been directed for defendant as requested.

The judgment is reversed, and a new trial ordered.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

BRAYTON *v.* BRAYTON.

1. APPEAL AND ERROR—DIVORCE—PLEADING.

On appeal from a decree of divorce granted for extreme cruelty, this court will not consider an objection to the sufficiency of the averments of the bill that was not raised in the lower court.

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2. DIVORCE—EXTREME CRUELTY.

Held, that the charge of extreme cruelty was established by the evidence.

Appeal from Hillsdale; Chester, J. Submitted April 16, 1913. (Docket No. 74.) Decided July 18, 1913.

Bill by Anna M. Brayton against Edward Brayton for divorce. From a decree for complainant, defendant appeals. Affirmed.

Frankhauser & Cornell, for complainant.

Charles A. Shepard, for defendant.

MOORE, J. The bill of complaint in this cause charges defendant, Edward Brayton, with drunkenness and extreme cruelty and prays for a divorce and the awarding to her of alimony. Defendant filed his answer on the 30th day of August, 1911, which was a general denial of the matters set forth in complainant's bill. Complainant filed a replication to this answer on the 5th day of September, 1911. A hearing was had in open court upon the merits. Later the court gave to complainant a decree for divorce on the ground of extreme cruelty. The case is brought here by appeal. No question about the alimony is raised.

Two questions are presented by the appellant in this court:

First. It is contended that the bill of complaint does not sufficiently charge extreme cruelty as a cause for divorce.

Second. It is contended that if the charge is sufficiently stated in the bill of complaint it is not made out by the testimony.

As to the first contention, an attempt was made to charge extreme cruelty in the bill of complaint. The case was tried on the merits. The question is raised

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in this court for the first time. This course does not have our approval. See *Smith* v. *Blake*, 96 Mich. 542 (55 N. W. 978); *Richardson* v. *Richardson*, 100 Mich. 364 (59 N. W. 178); *Holcomb* v. *Holcomb*, 100 Mich. 421 (59 N. W. 170); *Tackaberry* v. *Tackaberry*, 101 Mich. 102 (59 N. W. 400); *Daly* v. *Wayne Circuit Judge*, 102 Mich. 392 (60 N. W. 759).

Second. Was the charge of extreme cruelty sustained by the testimony? It would profit no one to recite this testimony; some of it is too coarse to appear well in print. It is sufficient to say of it that it brings the case well within the decisions of this court. See *Briggs* v. *Briggs*, 20 Mich. 34; *Goodman* v. *Goodman*, 26 Mich. 417; *Warner* v. *Warner*, 54 Mich. 492 (20 N. W. 557); *Berryman* v. *Berryman*, 59 Mich. 605 (26 N. W. 789); *Bailey* v. *Bailey*, 121 Mich. 236 (80 N. W. 32); *Utley* v. *Utley*, 155 Mich. 258 (118 N. W. 932).

The decree is affirmed, with costs.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

MOORE *v.* CURRY.

1. COVENANTS—ENFORCEMENT—EQUITY—INJUNCTION.

Equitable jurisdiction to enforce covenants is not absolute, but is governed by the same general rules which control equitable relief by specific enforcement: if the restrictive covenants in a deed were made with evident reference to the continuance of the existing general condition of the property and its surroundings, but in the

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lapse of time there has been a complete change in the character of the neighborhood, so as to defeat the purposes of the covenants and to render their enforcement an inequitable and unjust burden on the owner of the lots, the equitable relief will be denied and complainant left to his legal remedy.[1]

2. SAME—INJUNCTION—RESTRICTIVE COVENANTS—RESIDENCE PROPERTY.

In a suit to enjoin defendants from erecting a store building on Woodward avenue, in the village of Highland Park, in violation of restrictions imposed when the property was placed upon the market, evidence *held*, to sustain a decree enforcing the restrictive covenants in the several conveyances, on the ground that the character of the district had not so materially changed as to make it inequitable to enjoin a breach of the restrictions.

Appeal from Wayne; Donovan, J. Submitted April 22, 1913. (Docket No. 135.) Decided July 18, 1913.

Bill by Charles T. Moore and others against John Curry and others for an injunction and other relief. From a decree for complainants, defendants appeal. Affirmed.

Lodge & Brown, for complainants.

Friedman, Smilansky & Blumrosen, for defendants.

STEERE, C. J. The bill in this case was filed to enforce certain building restrictions and restrain the erection of a certain store building for business purposes, as proposed by defendants, on property situated at the northeast corner of Woodward and Currystone (or Grand) avenues in the village of Highland Park, a suburb adjoining the city of Detroit on the north. The property in question is part of a subdivision laid out by defendants Curry in 1905; the

[1] On the question of injunction against sale of, or proposal to sell, real property to person, or for purpose regarded as undesirable, see note in 44 L. R. A. (N. S.) 228.

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same being platted and many lots in said subdivision sold before the plat was placed on record.

The bill is filed by 48 owners of lots in this subdivision, each of whom owns one or more lots which were purchased from defendants Curry or their agents, and most of whom have built homes and reside upon their lots. The substantial allegations in their bill, supported by abundance of uncontroverted testimony, are that they were led to purchase because Highland Park was and is pre-eminently a suburban village of homes, free from noise, bustle, dirt, business confusion, saloons, and other deteriorating influences detrimental to home life; that said subdivision was put upon the market as a strictly residential district, large signs being placed upon the land stating that the lots were to be sold under such restrictions; that circulars and other special advertising matter were brought to their attention emphasizing this and announcing that the vendors when conveying would embody proper limitations to that effect in the instruments given; that agents of the owners, when showing complainants the property, dwelt upon the fact that it was particularly desirable for, and would be restricted to, residences, and therefore be entirely free from business houses, saloons, double houses, flats, public places, and anything which would be detrimental to home surroundings, it being the intention of the owners to require that only private dwellings should be erected upon any of the lots contained in said subdivision; that attention was also called by said agents to large stone pillars erected, or to be erected, at the entrances of two streets of the subdivision leading from Woodward avenue, which is the main thoroughfare running northerly through the city of Detroit and continuing on through Highland Park, and it was stated that fine residences would be erected upon this subdivision entirely across the front on said avenue, 12 of the 312 lots in said subdivision

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being situated on the east side thereof, and the attention of some of complainants was particularly called to the lots now in question, upon which it was stated there would be a $6,000 residence erected fronting on Woodward avenue, according to restrictions; that all of said complainants purchased the lots now owned by them relying upon such inducements and promises made by defendants Curry and their agents that all lots in said subdivision would be so restricted and kept under such restrictions, and that in reliance thereon complainants built homes upon their lots, ornamenting and beautifying their grounds, and have established their residences there at large expense; that they were induced to make such investments by reason of the environments and representations so made that it would be a restricted, quiet, suburban district, free from factories, saloons, and other things detrimental to home making.

While no building restrictions are contained in the recorded plat of this subdivision, all contracts of sale and deeds of lots given by the platters contained restrictions in harmony with the foregoing representations. It is undisputed that all lots sold in said subdivision by defendants Curry, including the lots upon which defendants contemplate erecting a store building, were sold subject to residential restrictions. The contract under which defendants Robinson, Levin, and Wetsman hold the corner upon which they contemplate and began the erection of the structure objected to by complainants is dated December 29, 1910, and contains the following language:

"That no business house, saloon, public schools, churches, store houses, manufactories, apartment houses, double houses, flats, or public places of any sort shall be erected on said lot that may be considered an annoyance on a private residence street; it being the intention that only one private dwelling shall be erected on or occupy each lot herein described. That, as a part and further consideration of the sale as

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hereby made, the parties of the second part shall erect on said lot a suitable private dwelling at least two stories high, to cost not less than $4,000; said dwelling to be not less than 40 feet from the front line of said lot and not less than 10 feet from the southerly line of said lot 10. No barn or outbuilding to be erected nearer to the said lot line than 60 feet and shall not build any building for the purpose of carrying on business thereon."

The testimony shows clearly that these restrictions were familiar to the defendants who propose erecting the store, and that they had tentative plans prepared and started the work by digging a small trench outlining the limits of the proposed building, to test the attitude of residents in the district and in anticipation of possible litigation. Defendant Robinson testifies:

"When we got this contract, we saw that the restrictions were there and we spoke to Mr. Potter (Curry's agent) about it. * * * I said, 'Being as I want to put up some stores, I want to see if there is anything to prevent it.' * * * Mr. Potter said he would put out the sign there that there would be stores. * * * That was done simply as a matter of business, that we were putting up stores there. We dug a trench about a foot wide and a foot or fifteen inches deep. We began that about four months ago and I understand the suit followed. * * * I have not exactly bought any material for it."

Witness further testifies:

"Mr. Charles F. Curry was the man I talked with. I asked about putting up more stores. * * * He said, 'You know it has restrictions;' and he says that 'there might be some trouble;' that is all he said."

As late as July 22, 1910, defendant Charles F. Curry filed a bill of complaint in the Wayne circuit court in chancery against certain parties to restrain them from erecting a two-family flat upon lots 138-139 of said subdivision, alleging the same was in violation of the building restrictions; that he was bound

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to enforce the same for the protection of himself and others to whom he had sold lots; and that the erection of said flat would result in irreparable damage to himself and all resident owners on Currystone avenue.

It is conclusively shown and practically conceded that the subdivision has been built up, developed, and improved as a strictly residential district; that the restrictions have been generally observed; and the erection upon said property of such a building as defendants propose would be a palpable violation of the restrictions found in their contract and imposed upon all purchasers in the subdivision unless changed, and unusual conditions render such restrictions no longer operative.

In the final analysis counsel for defendants raise for consideration and discuss but the one proposition that the environments and character of the locality, and especially that portion fronting on Woodward avenue, have so changed since the platting of this property that equity ought not to enforce this restriction. In support of this a rapid and phenomenal growth of the city of Detroit and its suburbs is shown, especially extending out Woodward avenue and into Highland Park in and around this subdivision. Testimony was introduced showing that Woodward avenue frontage in that locality is not desired or in demand for residence purposes; that it has become a business street and property on it only in demand for business purposes; that unrestricted land fronting on it sells much higher than that restricted; that 16 stores have been erected on said avenue within a block of Currystone; that most of them were erected since 1906; and that various kinds of merchandising, such as are usually conducted in the business part of a municipality, are conducted in said stores.

The trial judge, before whom the witnesses were produced and testified, personally inspected the premises in controversy for a better understanding of

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their testimony and made a finding of facts in connection with his opinion. As to the physical conditions of the property found by him after an inspection, in the light of the testimony given, he says:

"The court has made a personal inspection of the premises in controversy and of the property on both sides of Woodward avenue from the southerly limits of Highland Park village to the northerly limits thereof. From the testimony in this case, which has been verified by said inspection, the court finds that there is much vacant property on both sides of Woodward avenue throughout its entire length within said village; that there is apparently abundant room along the course thereof for the erection of such business places as may be necessary for the comfort and convenience of said section for many years to come; and that neither the comfort nor convenience of said section nor the inhabitants thereof nor of said neighborhood will be promoted or increased by the erection of a business house upon the premises in controversy. The entire section is new. There are but two houses upon Woodward avenue in Highland Park village that can lay claim to very great age, and those are two residences. * * * What store buildings and business houses do exist upon Woodward avenue are all evidently of recent erection. * * * New residences in the immediate vicinity of the property in question have recently been finished on Woodward avenue. The subdivision itself is only about six years old. What store buildings have been erected in the neighborhood are only two or three years old."

The doctrine which is invoked in behalf of defendants is quoted from and clearly stated in 3 Pomeroy's Equity Jurisprudence (3d Ed.), p. 2596, as follows:

"The equitable jurisdiction to enforce such covenants is subject to one most important limitation. It is not absolute, but is governed by the same general rules which control the equitable relief of specific performance of contracts. If, therefore, the restrictive covenants in deeds of lots were made with evident reference to the continuance of the existing general condition of the property and its surroundings, but in

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the lapse of time there has been a complete change in the character of the neighborhood, so as to defeat the purposes of the covenants and to render their enforcement an inequitable and unjust burden on the owner of the lots, then the equitable relief will not be granted, and the plaintiff will be left to his remedy at law. For example, if the covenants restricted the grantees of lots to use for purposes of residence, and since their execution the whole neighborhood had ceased to be used for such purposes, and had been wholly given up to business, manufacturing, and the like."

This principle has been applied in numerous cases cited by counsel and is recognized by this court in *Frink* v. *Hughes*, 133 Mich. 63 (94 N. W. 601), wherein it is said:

"We think the decree of the court below has sufficiently protected the defendant when, by its terms, it has left it open to him to bring to the attention of the court any changed conditions in the property which may take place at a later day."

In view of the proof of development and changing conditions in the vicinity of the subdivision, we think it would be proper to not foreclose bringing to the attention of the court any marked changed conditions of the property in the future, but at the present time the equities as well as the law are with complainants. At the present time Highland Park, taken as a whole, yet remains distinctively a suburban, residential village built up largely of houses of those whose business and labors are in Detroit. It is growing rapidly and chiefly from the city overflow. The great bulk of its population go there for homes, not for business. To accommodate such population, certain kinds of business have followed, and buildings to accommodate such business have been built in that locality along Woodward avenue. The most desirable sites for business will command a better price for such purposes than for residences. This is true of every

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restricted district which has developed to a point where the population and environments make a local demand for business. Since the construction of a belt line railroad around the city of Detroit, a few large factories, including the Ford automobile works, have been erected in the village on or near said belt line. This has increased the importance and population of said village, but its original distinctive characteristic as a village of suburban homes yet remains. To accommodate the inhabitants of the village as the population increased, the number of business places along Woodward avenue has increased; but it is shown there are sufficient to supply the needs of the community now and unrestricted vacant lots convenient for more when needed, and it is by no means shown that the whole neighborhood has ceased to be adapted to and used for residences and been given over to business. It is shown that it would be an injury to the residents on this subdivision for stores to be erected on the front along Woodward avenue with their rears towards the homes upon the subdivision and cutting off a view of the avenue. By their contracts the purchasers of lots in the subdivision back of Woodward avenue are entitled to have either a view in that direction or a line of appropriate residences fronting upon it. The only equitable consideration for refusing this relief, under present conditions, is that the lots on Woodward avenue would sell for more with the restrictions removed. This is not sufficient.

No such radical change has been shown in the environments and character of the neighborhood in which the restricted district is situated as to invoke the limitation contended for and justify the court in refusing at this time the relief asked.

The decree is affirmed, with costs.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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LEROY *v.* COLLINS.

1. PRESCRIPTION—PRIVATE WAY—ALLEY—EJECTMENT.
   Where a private way is improved by the owner and left open for the convenience of others, their use in common with the owners and those for whose special benefit it was opened is, as a rule, to be regarded as permissive only and under an implied license. As to a defendant who claims that his testatrix had exercised adverse user of a strip belonging to an alley that consisted of land taken from both adjoining owners, the use made of that portion taken from property which she did not own must be treated as permissive, not adverse.

2. SAME—ADVERSE USER—EXCLUSIVE POSSESSION NECESSARY.
   Defendant could not obtain title to that part of a vacated alley which belonged to adjoining property owners, under evidence of joint user by decedent with the other proprietors, permissive in its inception and not under color of title, since her alleged occupation under a claim of right which they disputed did not become exclusive, and the possession and user by both parties was of the same character.

3. SAME.
   Neither occupation in common with the public nor possession concurrent with that of the true owner is ever exclusive.

Error to Kent; Perkins, J. Submitted April 16, 1913. (Docket No. 72.) Decided July 18, 1913.

Ejectment by Simeon LeRoy and another against Hiram Collins as administrator of the estate of Margaret Collins, deceased. Judgment for plaintiffs. Defendant brings error. Affirmed.

Grove & Davis, for appellant.

A. C. Hindman, for appellees.

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STEERE, C. J. This action of ejectment, brought to recover possession of, and incidentally establish title to, a strip of land 8 feet wide east and west and 55 feet long north and south, immediately adjacent to, and claimed to be a part of, lot 14, block 2, of Coit & Co.'s addition to the city of Grand Rapids, is again before us on a voluminous record which, under previous adjudications of this court, only involves the one question of title by adverse possession.

Coit's addition was platted in 1856, and according to the plat thereof the piece in controversy is the westerly half of that portion of the land adjoining said lot 14 in the rear, laid out as an alley. Action was taken in 1859 by the common council of the city of Grand Rapids to vacate said alley, and, whether or not said proceedings constitute a legal vacation of the same, it has been held by this court that the action of the common council was sufficient to repudiate and negative any acceptance of dedication tendered by the plat, and the strip, of which the piece in controversy forms a part, did not become a public alley.

This contention has twice before been in this court, the first time in the chancery suit of *Le Roy* v. *Collins*, 154 Mich. 77 (117 N. W. 579), wherein it was held the land in question did not constitute a part of a public alley; and again in *Le Roy* v. *Collins*, 165 Mich. 380 (130 N. W. 635), involving this same ejectment suit, wherein it was held that the question of title had not been in issue between the litigants, nor decided in the chancery suit; that the record title to the same was in plaintiffs, who owned said lot 14, but the question of whether or not they had lost it through adverse possession was yet open and unadjudicated. The lower court having taken the view that the matter was *res judicata*, under the decision in the chancery suit, the case was reversed and remanded for a new trial upon the issue of prescription.

Margaret Collins, the original defendant, died dur-

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ing the pendency of this action, and, on suggestion of her death of record, proceedings were continued with her administrator as defendant. The history of the controversy and a sufficient statement of the disputed and undisputed facts involved is found in the two cases cited, and need not be repeated here. At the conclusion of the testimony on a retrial of the case, proceedings were had, which it is not necessary to detail here, resulting in a stipulation presenting, in proper form for review, the action of the court in directing a verdict for plaintiffs. After reviewing the testimony as a whole, the trial court reached the conclusion that defendant had failed to produce any evidence tending to establish his claim of title by prescription, and that there was an absence of such proof of exclusive, open, notorious, hostile, and adverse possession for the statutory period, as is essential to divest plaintiffs of their record title to the fee of the property.

Block 2 of Coit's addition is bounded on the west by Lafayette street, on the north by Hastings street, on the south by Bridge street, and on the east by what is known as the Knapp addition. It consists of twelve full length lots, four of which front south on Bridge street, eight west on Lafayette street with the alley in question lying in their rear to the east, and eight short lots adjacent to the alley on its east side, and abutting on the west Knapp's addition, without any intervening street or alley. The four lots fronting south on Bridge street have an alley running east and west across the addition at their rear, forming an entrance to the north and south alley involved in this controversy, which runs northerly 445 feet through the block to Hastings street. The annexed diagram, introduced in evidence in the case, shows said block 2 as originally platted in 1856, and the relative position of the lots, streets, and alleys mentioned.

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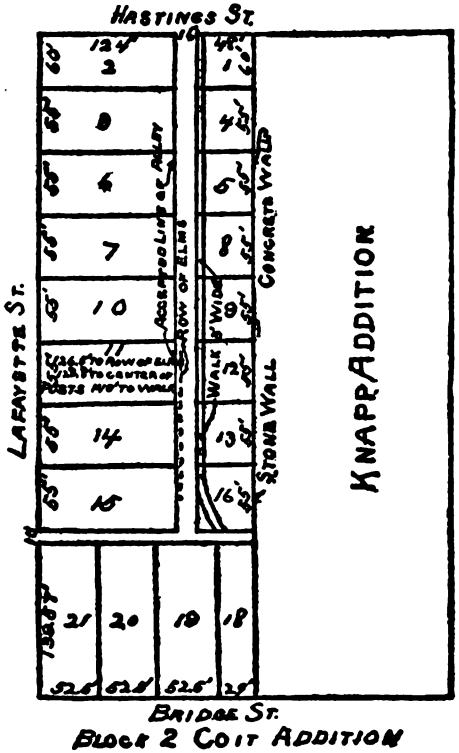
Margaret Collins and husband owned the eight short or fractional lots which form the entire eastern boundary of the alley, and her husband, Joel Collins, owns lots 18 and 19 on Bridge street. Lot 15, the most southerly of those facing on Lafayette street, is owned by plaintiff Simeon Le Roy, and lot 14, lying imme-



diately to the north and at the rear of which is the piece in dispute, is jointly owned by both plaintiffs.

On the trial of this action 46 witnesses were sworn. Their testimony was necessarily for the purpose of establishing or refuting exclusive adverse possession by Margaret Collins of the strip in question for the statutory period before the commencement of this case. The record title being in plaintiffs, the burden

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of establishing title by prescription rests on the defense. It is undisputed that a strip of land 16 feet in width, originally platted as an alley, of which this small piece in dispute forms a part, has been devoted to alley purposes for many years. There are not, and never have been, any buildings upon the same, or other improvements except such as were designed for, and appropriate to, its use as an alley, thoroughfare, way of travel, or means of ingress and egress to and from adjacent property. It has an improved driveway in the center, on the west side of which a few shade trees have been planted, and along its east side, upon the adjoining lots, runs a three-foot cement walk, built by deceased's husband primarily for convenience of occupants of some tenement houses constructed by him upon said lots, there being a two-family flat on lots 1 and 4, which faces north on Hastings street, and nine houses on the east side of the alley facing to the west.

Joel Collins, husband and agent of deceased, became interested in said block 2 as early as 1867, when few, if any, improvements had been made in that locality. He then purchased lots 18 and 19, which he yet owns. In 1873 he secured for deceased lots 8, 9, 12, 13, and 16. In 1885 he purchased from Daniel W. Coit and wife, the then owners, lots 1 and 4, upon which he erected the two-family flat, and at the same time obtained from them a quitclaim deed of the east half of the north end of the platted alley to the depth of 110 feet south from Hastings street, and the west half of said north end south 70 feet, and he later secured by tax title lot 5. At the time he obtained the quitclaim deed of 70 feet of the west half of the north end of the alley the Coits had previously sold the adjacent lots on the west by metes and bounds. The deed from the Coits to deceased in 1873 described the property conveyed as "fractional lots 8, 9, 12, 13, and 16 of block 2 of Coit & Co.'s addition, according

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to the recorded plat." The recorded plat showed the alley, although the same was not then a public alley, as already indicated.

When Collins bought lots 18 and 19 the land was broken and rough, so that in its then condition it was not possible to drive through the alley with a load. There was a ravine extending over those lots and to the northwest, along a portion of the alley and across the lots on the west, its deepest portion being on lot 16. Collins built a barn on lot 19 in 1872, and made a driveway along the east side of 19, which connected with the south end of the alley, and gradually improved the alley, working north from lot 19 until he opened a way of travel its entire length and over said lot 19, connecting Hastings and Bridge streets. In 1874 he and his brother had a contract for grading College avenue, in which they had to remove a large amount of dirt, and they used the low parts of the alley and their adjacent lots as a dumping ground; a large amount of dirt being required to fill lot 16. This filling served a double purpose. They had a convenient dumping ground for the dirt required to be moved under their contract, and they also, at the same time, leveled up and improved their lots and the adjacent alley. Collins testifies:

"After we had acquired all of the property on the east side of this property, which is now 'Collins Place' (the name given by him to the property he and wife owned there) * * * we laid out the alley the entire length to Hastings street 20 feet wide from the rear of lots 18 and 19 and built houses on the east side of it; there are more houses than there are lots; the idea was to get all the houses in there we could. * * * I set those poplar trees out about '80, six or seven of them; * * * they were set along that line and kept for shade trees to accommodate my tenants. At the time I commenced the improvements the Keatings lived on lot 6 or 7; then there was no one until you come to about 14—a man by the name of Schmidt lived there; people could not very well get

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out of 7, 14, or 15 until I graded it up; most all the wood, coal, and such things were drawn from Lafayette street frontage."

While there is much testimony, more or less conflicting, as to the kind and extent of use made of the alley by the owners and occupants of lots abutting it on the west and fronting on Lafayette street, together with their understanding and claim of right in that connection, in disposing of the question before us we must be governed by the undisputed facts and defendant's testimony taken as true. The conclusion of a witness, however, or a general and sweeping assertion inconsistent with admitted facts, or specific facts testified to by the same witness do not control. Although Collins testified that he had exclusive possession of this alley, his testimony in detail and the admitted facts negative this conclusion.

While an alley at the rear of their property was of interest and value to the owners of lots at the west fronting on Lafayette avenue, their use of and interest in it was relatively small compared with Collins'. The improvement and use of the alley was of vital importance to his project for developing the property on the east, which had no other outlet. He took the burden of improving the alley and did improve it. This was naturally agreeable to all adjacent owners, so long as they were not excluded from it. While the testimony discloses that it was believed by some, if not all, of the abutting owners, other than Collins, to be a public alley, the truth was that he improved and opened this alley on private property, owning but little of it when he began. He never had any title to any of the lots on the west side, or to the piece now in dispute, and no claim to it except that of possession.

According to his own testimony Collins never objected to the use of the alley in connection with the lots on the west side, or to its use by any one who desired, except, as he states it, "they were damaging

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something." It was an improved way of travel along lines shown on the plat, was so opened and connected that it furnished a passage from one street to another, and all were free to use it as a thoroughfare, so long as they used it properly and did no damage.

It is undoubtedly the law that where a private way is improved by the owner and left open convenient for others, their use of it in common with the owners and those for whose special benefit it was opened is, as a rule, to be regarded as permissive only, and under an implied license. Conceding this true as to defendant, the rule only applies to land defendant owned. The implied license or permission to use the land on the west half of the alley was from those who owned it, not from him.

Collins shows that he exercised vigilance in insisting on proper use of the way and forbade improper uses, such as throwing rubbish upon it, leaving conveyances standing there overnight, or stable cleanings lying adjacent, and cutting it up in hauling dirt upon an adjoining lot. He did this, as he testified, under a claim of ownership. He admits this claim was denied by certain of the occupants of adjoining property, who insisted on equal rights to use the alley, and continued its use without objection from him, so long as they used it properly. In building the cement walk on the east side, Collins placed it on the line of the alley as designated on the plat, leaving the alley 16 feet wide. He says he knew it so appeared "as a vacant alley" on the plat.

It stands in this case undisputed that no signs or notices were ever put up that this was private property; that defendant never inclosed it; that after it was made passable as a way of travel it always remained open, in general use, free to all who desired to use it and used it properly; the only objections ever made to its use by Collins being to an improper use which damaged something.

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All this has materiality only as it bears on defendant's claim to exclusive possession of the eight feet along the rear of lot 14. This lot was partitioned to John Clancy, one of the platters of the property, by deed, before the time of the proceedings to vacate the alley. He sold it in 1872. It was early built upon and occupied. In its natural condition the rear was lower than the front, and coal, wood, etc., were hauled in from Lafayette street. As early as 1878 there was a barn on the back end of the lot. A man named Schmidt bought the lot in 1883 and lived there several years. He filled up the rear of the lot in 1883, making it level with the front and the alley. He used about 600 loads of earth for this filling taken from Hastings street. He used the alley for this purpose, believing it a public alley, and asked permission from no one. As to this Collins testifies:

"Mr. Schmidt never asked me any permission that I know of. I never saw him use the alley in connection with the rear of this lot, except when he moved that dirt. I never told him not to use it."

A man named Hawkins, who purchased the lot from Schmidt, used the alley. He built a fence at the rear, putting a gate in it. When building the fence he proposed to cut down a certain tree standing near the line and Collins forbade it, claiming to own the alley. This Hawkins disputed. They were friendly, Collins says, and he did not forbid him using the alley. Hawkins did not cut the tree but continued to use the alley, hauling over it wood, coal, etc., as he desired, and moved his household goods that way when he left. A tenant on the property named Mohrhardt, using the alley, drove over Collins' walk on the east side and damaged it. Hot words were exchanged, and Collins, asserting ownership, threatened to shut him out from its use. Collins testified Mohrhardt asked permission to use the alley, and Collins said he

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had no objection so long as he did no damage. In cross-examination he testifies:

"*Q.* Is it not correct that, when you told him you would shut him out of there, he told you in substance that you could not do it?

"*A.* That was about what took place."

Mohrhardt used the alley after the trouble as before.

After plaintiffs procured the property in May, 1906, being owners and occupants of adjacent property, they had made but little use of the alley, except to take some wagons over it and through the gate to store them in the barn, when defendant proceeded to assert his claim to this eight-foot strip at the rear of their lot by planting a row of small elm trees upon it, one of the trees being directly opposite plaintiffs' barn door and another opposite the middle of their gate, and to build a fence along the east side of the trees, entirely shutting them off from the use of the alley in connection with lot 14. This declaration of war was followed by the chancery suit heretofore referred to, filed on the theory that the strip was part of a public alley, and seeking to restrain defendant from interfering with complainants' use and enjoyment of the same. No claim of ownership or right to exclusive possession of the strip now in dispute was then made by plaintiffs. This court having held that the strip was not a public alley, that title to the same was in the adjacent owners, and that complainants had not sufficiently shown acquisition of an easement in the entire alley by adverse user, their bill was dismissed. Defendant's title and right of possession to the eight feet of the alley on her side of the line having been established, she proceeded, through her husband as agent, to maintain, under claim of ownership by adverse possession, the eight feet on complainants' side, not only cutting them off from the use

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of the alley but from possession of the eight feet they had record title to, at the rear of lot 14.

The infirmity in defendant's contention for exclusive adverse possession is it stands undisputed that the only possession she ever had of this eight-foot strip was for improvements as a thoroughfare, and its use as such in connection with others. It was only improved by Joel Collins for that purpose. He had no title to it. The improvements he made and his use of it as an alley were unquestionably permissive, in their inception. He then certainly had no claim of right or color of title to this strip. The alley has ever since been open and used by adjoining owners on both sides and by the public, as occasion demanded, as a thoroughfare and way of ingress and egress. When and how, according to defendant's evidence, did this permissive and concurrent possession become exclusive and adverse? Collins testified to making a claim of ownership, which was denied by adjacent owners and users of the alley; they continuing the use of the alley for the purpose to which it was devoted, as before, under a claim of right on their part.

So far as possession and use are involved, that of plaintiffs and defendant were the same in kind, varying only in degree. Each was only using the other's land for alley purposes. The presumptions as to permissive use apply alike to each party when, without objection, using the land of another in connection with his own for a way of travel. Occupation in common with the public is not exclusive possession, neither is possession concurrent with that of the true owner ever exclusive. *Marble* v. *Price,* 54 Mich. 466 (20 N. W. 531); *Hittinger* v. *Eames,* 121 Mass. 539; 1 Cyc. p. 1025. Defendant's possession is not shown, *prima facie,* to have been hostile in its inception nor exclusive during its continuance. The only evidence in the case from which could be found distinct exclusion of plaintiffs from this eight-foot strip, and a hostile

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possession against them is at the time of planting the small elm trees and building the fence in 1906, thus entirely shutting them off from both the use of the alley and the strip in question to which they held the legal title.

We think the trial court correctly held that there was no issue of fact for the jury on the one open question of adverse possession.

The ruling of the court in directing a verdict for plaintiffs is sustained, and the judgment affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

PRIEBISCH *v.* OTTENWESS.

1. FRAUD—EVIDENCE—ADMISSIONS.
   Evidence that defendant admitted charges of false representation in the presence of plaintiff and his attorney, who was sworn as a witness, was competent and admissible; testimony concerning other admissions made in plaintiff's absence, not being privileged, were properly admitted, in an action on the case for fraud, whereby defendant induced plaintiff to withhold from record a chattel mortgage on property that defendant conveyed away.

2. SAME—COMPROMISE AND SETTLEMENT—EVIDENCE.
   Admissions made to plaintiff and his attorney during an attempt to collect the money which defendant owed, were not governed by the rule that negotiations for settlement are privileged; no dispute as to the indebtedness existing at the time of the conversations.

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3. SAME—NEGOTIABLE INSTRUMENTS.
Nor was it error to admit in evidence a dishonored check for the full amount of the alleged debt drawn by defendant on a drawee who had no funds of defendant in his hands.

4. APPEAL AND ERROR—EXCEPTION—SAVING QUESTIONS FOR REVIEW.
The court, on error, will not consider the refusal of the trial judge to strike out testimony, when the appellant does not discuss the subject in his brief, or refer to any exception to the ruling.

5. AMENDMENT—FRAUD—SALE—DECLARATION.
Where plaintiff charged in his declaration that defendant, after fraudulently inducing plaintiff to withhold from record a chattel mortgage on defendant's property, transferred his property to a partnership of which defendant was a member, and it appeared on the trial that there was a bill of sale by defendant to one H., who conveyed the mortgaged property to the partnership, the court did not err in amending the declaration so as to show the facts: the amendment did not state a new cause of action.

6. SAME—VARIANCE.
Nor did it so change the scope of the action as to amount to a variance between the declaration and the affidavit for a capias in the cause.

7. APPEAL AND ERROR—DIRECTING VERDICT—EXCEPTION.
An exception is required to review the refusal of the trial court to direct a verdict for defendant.

Error to Kent; Cogger, J., presiding. Submitted January 10, 1913. (Docket No. 57.) Decided July 18, 1913.

Case by Max Priebisch against Bernard Ottenwess for fraud. Judgment for plaintiff. Defendant brings error. Affirmed.

George Hollway, for appellant.

Cornelius Hoffius (Edward B. Strom, of counsel), for appellee.

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MCALVAY, J. This case is brought before this court by defendant by writ of error to review a judgment of the circuit court for the county of Kent, entered upon the verdict of a jury in favor of plaintiff.

Plaintiff was a baker by trade, and had been working as such for defendant in his bakery in the city of Grand Rapids. He was a German, and did not understand or speak the English language. He is described by the defendant as a truthful, honest man. He had accumulated $500, which, on November 21, 1908, he loaned to defendant for one year at 5 per cent. interest, taking a promissory note therefor secured by a chattel mortgage upon the entire stock and fixtures of defendant's business, and also three horses, two wagons, and all other equipment used in the business contained in defendant's barn. This was all the property defendant owned at the time. The suit was commenced by *capias ad respondendum*, upon which defendant was arrested and held to bail.

The claim of plaintiff, as charged in the affidavit for capias, and as alleged in the declaration, is that, immediately after his mortgage was given, defendant, intending to cheat and defraud him, represented that his credit would be injured if plaintiff filed and recorded his chattel mortgage, and, falsely and fraudulently intending to cheat and defraud him, induced plaintiff not to file and record said mortgage, upon the promise that he would pay him the full sum borrowed within six months, with interest for one year and would not sell, remove, or incumber any of the property covered by the mortgage; that about three months thereafter plaintiff was informed by defendant that he had received an offer of partnership, and to act as manager in another bakery, upon which the plaintiff told him that he would at once record his chattel mortgage and protect his security; that defendant, having already sold and transferred all of the property covered by the chattel mortgage,

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and been paid for the same and entered into a partnership without the knowledge of plaintiff, falsely and fraudulently represented to plaintiff and promised him that if he accepted such offer he would not dispose of his business, but would retain and continue the same, and represented that his security would continue good and safe, and the property would remain under the lien of the mortgage; that plaintiff believed and relied upon such false and fraudulent representations, and was thereby deceived and defrauded, and induced by defendant not to put his chattel mortgage on record—by all of which acts and doings of defendant the security of said mortgage was rendered worthless, and he was defrauded and damaged to the amount of such mortgage. The case was tried upon the general issue pleaded by defendant; no question having been raised as to the sufficiency of the declaration or the regularity of the proceedings.

When defendant sold this chattel mortgaged property he represented to the purchaser that it was free and clear from all incumbrances, and, in stating to him his indebtedness, did not mention this debt to plaintiff. The record shows that he sold this chattel mortgaged property to Clemens Huxoll, receiving $1,500 therefor at the time, and later $300; that a partnership was at once formed between defendant and the son of the purchaser, and at once Huxoll, Sr., transferred the same to the partnership. Soon afterwards this partnership became financially embarrassed, gave a trust mortgage and went into the hands of a receiver. The record also shows, from the testimony of defendant, that at the time he borrowed this money from plaintiff he was deeply in debt, some dealers having already denied him credit, and that if the chattel mortgage had gone on record it would have embarrassed him with his creditors. The errors assigned and relied upon by defendant necessary to

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be considered relate to the admissions and competency of certain testimony, to the effect of an amendment to the declaration, which was allowed during the trial, and the refusal of the court to direct a verdict because there was no proof that the false representations, if made, were relied upon by plaintiff.

After this case was at issue, and before the trial, the plaintiff was committed to an insane asylum, where he remains a patient. A guardian was therefore appointed, and the case proceeded. On the trial the defendant was called as a witness by plaintiff for cross-examination under the statute, and all the facts in the case relied upon by plaintiff were admitted by him, except the fraudulent representations claimed to have been made to plaintiff to induce him not to file his mortgage, and that he would not dispose of the mortgaged property. These are the only disputed questions of fact in the case. A short time before the trial there was a substitution of attorneys for the plaintiff. The attorney first employed by plaintiff, and who had several interviews with defendant before suit was instituted, some of which were had in the presence of both parties to this suit, was called as a witness for plaintiff, and was asked to testify as to what was said by defendant at these interviews, and was allowed to testify that he recited to defendant the facts and circumstances charged and relied upon by plaintiff against him, by which defendant fraudulently induced plaintiff to refrain from putting the chattel mortgage on record, and the other charges of fraud made against him by plaintiff, upon which this suit is founded, and the admission of defendant that all such charges of fraud and misrepresentation were true. He was also allowed to testify as to these charges, made in his presence, by plaintiff to defendant, and defendant's admissions to the plaintiff that

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they were true, all of which testimony relating to the matters stated was admitted over the objection of defendant that it was hearsay and incompetent, also upon the ground that these were statements made while the parties were attempting to arrive at a settlement.

The testimony of this witness as to the charges of fraud made by the plaintiff against defendant in the presence of this witness and his admissions that they were true was competent and admissible, and in our opinion the testimony of this witness as to the admissions of defendant, plaintiff not being present, when witness told him of the claims and charges of fraudulent conduct which the plaintiff made against him, was also admissible. These were not privileged communications, nor is the witness disqualified from testifying.

The last objection that they were not admissible because made in an attempt to settle a dispute is not meritorious. There was never any dispute as to this indebtedness. Defendant admits in his testimony that he borrowed the money from plaintiff and has not repaid it. It was simply an attempt on the part of plaintiff to collect, and the well-settled rule that, where parties meet for the purpose of settlement, admissions made by either party cannot be introduced in evidence does not apply.

Another assignment of error on the introduction of testimony is that the court erred in allowing in evidence a certain check, given by defendant to plaintiff for the full amount of this indebtedness, which, upon presentation, was dishonored because of no funds. This was brought out upon the cross-examination of defendant. It was a pretended payment of this indebtedness by a check fraudulently drawn by defendant against the firm of Ottenwess & Huxoll, purchasers, by two certain transfers, of the property

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defendant had mortgaged to plaintiff. It related to this transaction and was of like character, and was admitted by the defendant to have been drawn against no funds.

The error assigned upon the refusal of the court to strike out the testimony of witnesses Clemens Huxoll and William Callahan is not discussed in appellant's brief, and we do not find in the record, nor are we referred to, any exceptions to such action of the court. It will therefore not be considered.

It appears from the record that on or about February 1, 1909, defendant sold this chattel mortgaged property to Clemens Huxoll, and that the defendant and the son of Huxoll entered into a partnership, and that Huxoll transferred this property to the partnership. The fact that there was a bill of sale by defendant to Huxoll was not known to plaintiff until during the trial. The declaration charged that defendant transferred the property to the partnership. The plaintiff asked leave to amend the declaration to conform to the proofs by substituting the words "by bill of sale to Clemens Huxoll" for the words "to the partnership." It is contended on the part of defendant that this amendment states a new cause of action, and ought not to have been allowed. No new cause of action is stated. Plaintiff in the declaration relied upon the fraudulent representations made by defendant to him after he had stated he would file the chattel mortgage, and induced him not to file it, fraudulently representing, after he had disposed of this property included in the chattel mortgage, that he, the defendant, would not sell or dispose of said property, and that plaintiff's security was sufficient, and that by reason of such false and fraudulent representations defendant was able to transfer the mortgaged property, to plaintiff's great damage. The amendment does not in any respect materially change

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the allegations. The transfer by defendant to Huxoll, and then by Huxoll to the partnership, brought about the same situation charged in the declaration; that it was transferred to the partnership. It amounts simply to an amplification and correction of the statement of the cause of action originally intended, and which was the real subject of controversy between the parties. *Gensler* v. *Nicholas*, 151 Mich. 529, at page 532 (115 N. W. 458, 14 Am. & Eng. Ann. Cas. 452). The amendment to the declaration was properly allowed.

It is urged that this amendment created a variance between the declaration and the affidavit for the writ of *capias ad respondendum*, and would operate to release the sureties on the bail bond. We have already determined that the amendment was properly allowed, and did not enlarge the scope of the action, or change its identity. Therefore it would not amount to a variance between the affidavit and the declaration. *Wilkinson* v. *Nichols*, 48 Mich. 354 (12 N. W. 486). See, also, *Musselman Grocer Co.* v. *Casler*, 138 Mich. 24 (100 N. W. 997); *Fish* v. *Barbour*, 43 Mich. 19 (4 N. W. 502).

Error is assigned by defendant on the refusal of the court to direct a verdict in his behalf at the close of plaintiff's case. Defendant took no exception to the denial of such motion. The question, therefore, is not before this court for determination. Other errors were assigned, but are not discussed in appellant's brief.

The disputed questions of fact in the case were submitted to the jury for its determination under the charge of the court, to which defendant has made no objection, except the general one that the court erred in submitting the case to the jury on the ground that there was no evidence to sustain the allegations of fraud charged in the declaration. An examination of all of the evidence shows that there was evidence in

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the case which warranted its submission to the jury, and that the verdict of the jury was justified under such evidence.

The judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, BROOKE, KUHN STONE, OSTRANDER, and BIRD, JJ., concurred.

ROTH *v.* RUBERT.

1. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW—MULTIPLICITY OF SUITS.

   Where complainants filed a bill to enjoin certain defendants from prosecuting their appeals from the allowance of claims filed against the estate of a decedent, and the point was first raised on appeal to the Supreme Court that the complainants' remedy was at law, and where the controversy had been heard and determined by the judge of the circuit court in chancery and if the complainants were remitted to the law side of the court several suits were likely to arise, jurisdiction is retained by the court to dispose of the alleged equitable estoppel relied on by complainants.

2. ESTOPPEL—EQUITABLE ESTOPPEL—RATIFICATION.

   If a person by words or conduct intimates that he consents to an act and will offer no opposition to it, although it could not have been lawfully done without his consent, thereby leading others to change their position or relinquish rights which they might have enforced, he will not afterwards be permitted to question the legality of the act which he has sanctioned.

3. SAME—EVIDENCE—COMPROMISE AND SETTLEMENT.

   Evidence considered, and *held*, to estop defendant from

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denying that her assignor assented to a compromise of his interest in decedent's estate and of claims presented against it.

Appeal from Livingston; Miner, J. Submitted January 9, 1913. (Docket No. 25.) Decided July 18, 1913.

Bill by Catherine Roth and others against Elizabeth Rubert to enjoin appeals of defendant from the determination of commissioners on claims in the estate of David Robison, deceased. From a decree granting partial relief, both parties appeal. Modified and affirmed.

William P. Van Winkle and *Louis E. Howlett*, for complainants.

Shields & Shields and *James A. Greene*, for defendant.

KUHN, J. In this cause the court of chancery is resorted to for the purpose of preventing the prosecution of two appeals from the allowance of claims by commissioners on claims in the probate court. David Robison, a bachelor, died in 1911, leaving an estate of about $27,000. Living with him at the time were Mary Cummiskey, a niece, who acted as his housekeeper, and James La Grange, his nephew. His heirs at law are: Two sisters, Catherine Roth and Jane Dunn; Mary Newman, Adela Fields, and Catherine Leedle, daughters of a deceased brother; James La Grange, son of a deceased sister; and William Robison, son of a deceased brother—all of whom were over 21 years of age. Administration of the estate having been begun, it became apparent that several large claims for services would be presented to the commissioners on claims, who had been appointed. James La Grange, Mary Cummiskey, and Catherine

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Roth claimed to have performed services for Robison during his lifetime and La Grange claimed to have let his uncle have some of his money. In order, if possible, to avoid litigation, an attempt was made among the heirs to effect an amicable adjustment of these claims.

A petition having been filed to have James La Grange declared an incompetent person, and for the appointment of a guardian, a meeting of the heirs was arranged by Mr. L. E. Howlett, an attorney representing one of the claimants and several of the heirs. A meeting was held in his office on the 31st day of January, 1912, at which meeting there were present Catherine Roth, George Roth, her husband, Mary Newman, George A. Newman, her husband, Adela Fields, William Robison, and Mr. Howlett. At this meeting, it is claimed, a settlement was discussed, which was to result, after paying the claims, in each sister and the family of each deceased brother and sister receiving the sum of $3,000 from the estate. Another meeting was arranged for February 2, 1912, and before leaving the office it is claimed that William Robison stated that it would be impossible for him to be present on that date, but that any arrangement by Mr. Newman, who was to attempt to bring about the settlement, would be satisfactory to him, if agreeable to the other interested parties. A meeting of all the parties in interest, with the exception of William Robison, was had, and resulted in an agreement in writing being entered into, by which Catherine Roth's claim was to be allowed at $500, James La Grange's claim at the sum of $5,300, and Mary Cummiskey's claim at the sum of $5,300, and also provided for the complete distribution of all of the estate so that each interest would receive the sum of $3,000, as proposed in the meeting of January 31st. William Robison's name was signed to the paper by Mr. Geo. Newman, under the claimed authority received at the meeting

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of January 31st. The commissioners on claims met on February 8, 1912, at which meeting William Robison was present, and the agreement in writing was presented to the commissioners, read to them, and a request was made to have the claims allowed as agreed upon. As no proofs were offered in support of the agreement, upon objection being made by Mr. Shields, an attorney representing the administrator, the meeting was adjourned until February 13th, at which time formal proofs were made to support the claims, and they were allowed according to the agreement. Defendant Elizabeth Rubert claims to be the assignee of the interest of William Robison in the estate, and as such filed claims of appeal in the allowance of the Roth and Cummiskey claims. The circuit court restrained the prosecution of the appeal in the Roth claim, but denied the relief prayed for as to the Cummiskey claim, and both complainants and defendant have appealed.

It is claimed that William Robison, by his conduct subsequent to February 2, 1912, ratified the written agreement of that day, and that because of his conduct Mrs. Rubert, his assignee, should be estopped from prosecuting the appeals. On the part of the defense it is claimed that at the time it is urged that William Robison ratified the agreement he did not know all the facts concerning these claims, and that he learned, subsequent to that time, from Mr. Rubert that Mary Cummiskey had been paid sums of money by David Robison for her services, and had made a settlement with him some years previous for $1,750, and she, having since deceased, left an estate of $10,000, or more, and that she must have received this property from her uncle, as she had no other source of income. He also claims that he learned that the Roth claim had been barred by the statute of limitations.

The theory upon which relief is sought being that

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the doctrine of equitable estoppel should be applied, and the assignee of William Robison's interests be prevented from prosecuting the actions at law, the point is made that the equity court is without jurisdiction, because the doctrine of estoppel relied upon by complainants could be urged in the suits at law in support of the claims. Adjustments of controversies arising out of the settlement of an estate have been, and should be, favored by the court. Those interested in the claims and in the residue were all of kin, and if no adjustment had been arrived at, protracted and expensive litigation, it is fair to assume, would have resulted. If the jurisdiction of the chancery court is denied, several suits will have to be tried; and, in view of the fact that the matter has already been determined by the trial court, and is now before us for final determination so as to avoid multiplicity of suits, we feel constrained to hold that the controversy is properly within the jurisdiction of the equity court.

Did William Robison ratify the agreement of February 2d by his conduct subsequent thereto? It is undisputed that on February 8th, when the parties in interest appeared before the commissioners on claims, he was present and heard the agreement read and the claims argued. His own version of what occurred is shown by his testimony, as follows:

"*A.* I heard Mr. Van Winkle read this agreement to those commissioners; heard him argue to the commissioners that these claims ought to be allowed because the heirs had all agreed upon the amounts. I did not hear Mr. Howlett make the same statement; I didn't say anything to the commissioners in opposition to it. I kept still all day; went home at night. I did not tell the commissioners that day, or anybody else, that I objected to allowing those claims; I didn't think that I needed to. Mr. Shields made the objection, and I didn't think there was any need of me. I supposed they would have to be sworn in anyway. I suppose I was opposed to those claims that day; I

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didn't tell that to anybody. I didn't suppose I had to. I never told anybody before April 17th that I was opposed to those claims. I was not here February 19th, when Mr. Roth and Barney Cummiskey were sworn. I knew there was an adjournment made to the 19th to hear those claims; I was opposed to them, but I didn't come near the meeting. I didn't suppose I had to. I did not call up anybody and talk about the claims. I did absolutely nothing."

The claimants who were presenting their claims were relying upon the agreement and he heard his name read as having signed, nevertheless he remained silent and raised no objection, and did not attend the adjourned meeting, although he knew its purpose. If at the times the claims were presented and allowed he had raised objection to the agreement, in all probability the claims would not have been presented at the amounts that they were, as the amounts agreed upon were the result of compromise in settlement.

Mary Cummiskey having died since the allowance of the claims, Mrs. Roth lost an important witness, and it is urged, with some force, that the representatives of Mary Cummiskey's estate are in a less favorable situation with reference to that claim in case of contest, as they have not the same knowledge of the facts and circumstances surrounding the claim and the location of testimony to support it as she had. Having remained silent when he should have spoken, he should not now be heard to complain when, as a result of his remaining silent, he placed the claimants in a less advantageous position with reference to their claims if a contest should now be permitted. The rule of law applicable to his conduct is well stated in the case of *Truesdail* v. *Ward*, 24 Mich. 117, 134:

"It is a universal law that if a man, either by words or by *conduct*, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby

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induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

See, also, *Michigan Paneling, etc., Co.* v. *Parsell,* 38 Mich. 475; *Peake* v. *Thomas,* 39 Mich. 584; *Heyn* v. *O'Hagen,* 60 Mich. 150 (26 N. W. 861); *Burt* v. *Mason,* 97 Mich. 127 (56 N. W. 365); *Miller* v. *Ross, Bradley & Co.,* 107 Mich. 533 (65 N. W. 562); *Dillon* v. *Craig,* 168 Mich. 216 (132 N. W. 1041); *Detroit Savings Bank* v. *Loveland,* 168 Mich. 163 (130 N. W. 678). William Robison was apparently satisfied with the settlement until he received information concerning the claims from Mr. Rubert. Mary Cummiskey is a sister of Mrs. Rubert, and their mother, Jane Dunn, is one of the parties to the contract and agreement.

The original petition for the appointment of guardian for James La Grange prayed for the appointment of Mr. Rubert as guardian, and on the day set for hearing this petition all the heirs, including William Robison, filed a written instrument asking that George Newman be appointed. The day after Mary Cummiskey's funeral we find William Robison at the Rubert home, and the assignment was made. William Robison relates how it was made, as follows:

"While at Seth's house the day after Maime's funeral, and the next day I claim to have assigned my interest in the David Robison estate to Mrs. Rubert; there were some papers prepared, and I signed them at Mr. Rubert's house. An attorney was called down there to the house, and I signed them down there. I don't know why I didn't come uptown to sign them. I think Mr. Rubert asked an attorney to come down there. I didn't sell out my interest for any amount. I didn't get any money at all, and haven't to this day, and have got nothing from Mrs. Rubert to show I have sold my interest in the estate except the promise. I have got a writing at home, a paper; haven't got it here; can't tell what it says. It said she would give

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me all over and above $3,000, but I should have three thousand over and above. I should have $3,000, and half over and above that. I don't know how there is to be any above that. He told me if I were to assign this over, they would fight the claim for me. I didn't have the money; all they made out of it they were to split. I to have half and Mrs. Rubert half, and he is now fighting it for me. He hasn't paid me anything. I understand the day I made those papers that was the last day an appeal could be taken. I think the judge of probate told me that. I was in his office with Mr. Rubert two or three hours before these papers were signed. I think those papers were signed about 2 o'clock; think I was up to the judge of probate's office before dinner. Rubert took me up there to talk about something regarding this case, about appealing. Rubert said he would appeal for me; let me have the money to do the work; that he would appeal for me and furnish the money and go on my bond. Then in the afternoon that was changed, and I signed some paper, assigned it right over to Mrs. Rubert, and she made the appeal for me, and is now acting for me in this matter, I suppose."

By the agreement made William Robison did not get any money, and it provides that Mrs. Rubert shall prosecute this appeal, and in case the final distributive share of William Robison in the estate of his uncle, after deducting the expense of litigation, does not exceed $3,000 that Mrs. Rubert will then release and reconvey the property assigned. In case his distributive share exceeds $3,000 after deducting the expense of litigation it provides:

"Then the said parties hereto are to share equally in any and all excess or residue; that is to say, that the said Elizabeth Rubert shall duly assign, convey, and make over unto the said William L. Robison one-half of all such excess, the remaining one-half of the same to remain the individual property of the said Elizabeth Rubert."

It certainly can be claimed that this was an unfair arrangement and while William Robison is not complaining, nevertheless it is illuminating as showing

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the relationship of the parties to this controversy. In no contingency, by the strict letter of this agreement, can William Robison profit. The motive of Mrs. Rubert in taking this assignment is explained in her testimony as follows:

"*A.* I have no desire only this, the desire I had; the deal with William Robison and myself I will admit, was a purely business transaction.

"*Q.* For what purpose?

"*A.* Why, it was just a business transaction between him and myself.

"*Q.* What was your motive in buying in there?

"*A.* My motive for buying in was, as I said, to get inside the ring. I was just outside, and was to get inside, to get inside so I could do something to see that was divided up; my mother would get what belonged to her."

It is claimed by William Robison that he had no knowledge of the settlement of Mary Cummiskey with David Robison by which she received $1,750 in settlement of her services up to that time. This settlement is claimed to have been made in the presence of Mr. and Mrs. Rubert, David Robison, and Mary Cummiskey.

Mr. Louis E. Howlett, the attorney, testified as to the conversations had in his office on January 31st, and stated that the proposed settlement was fully discussed in the presence of William Robison. With reference to Mary Cummiskey's claim he says the following occurred:

"Then the question came up of Mary Cummiskey's claim, and they all said she was asking too much, and they all said that, and they went on to tell the mortgages she had, and as they said Dave had given them to her, but George said they were matters of a private nature that he didn't want brought up, and if they were brought up it might sweep the estate, and he wanted it settled, and he said he thought if the heirs would take $3,000 apiece, and Mrs. Roth to have $500 more, that a settlement could be made; and Mrs. Roth

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spoke up and said she would be glad to get $3,000 and he turned to Willie Robison, asking him if he would be willing; he said: 'Yes; that is more than I ever expected to get.' Then it was talked about how they would get together, and I don't just remember the talk, but George said he would get them all together in a couple of days; I don't know, maybe he set the date; I don't remember, but he asked Will Robison if he could come back, and he said 'No,' he couldn't keep running over here, that he was teaming it, and he turned to me, he says, 'Is it necessary for me to come back?' I said: 'No;' it wasn't necessary; 'you ought to come.' He said: 'You folks go ahead and get a settlement if you can; whatever the rest agree to I am willing to stand by.' * * *

"Q. Mr. Howlett, after Willie Robison was present in your office on the 31st of January, I ask you whether or not he knew what it was claimed by different heirs that Mary Cummiskey had been paid upon her claim, if anything?

"A. Well, as to the exact amount in dollars and cents, I couldn't say, but I know that on that day Mr. Newman told of different mortgages that were recorded, either in Miss Cummiskey's name singly or jointly with Dave Robison, and he said in his opinion they had been given to her for services, and that he had been told that she was paid as they went along."

Mr. Newman testified as follows:

"It was talked to Willie Robison that the claims of Mary Cummiskey and James La Grange were somewhat around $5,000 or $6,000 at that time. I did not know just what the claim was at that time, and Mrs. Roth's was $500. And it was talked that there would be left somewheres around $3,000, as a distributive share for Will Robison, and for each of the others, $3,000 apiece for each of the five heirs. My wife and her two sisters would take one share, $3,000; Will Robison would take $3,000; Aunt Jane and Aunt Kate, each take theirs; and Willie Robison would take his $3,000 for his share.

"Q. What did Willie Robison say about taking the $3,000 for his share?

"A. At that time, I don't know as he said. He said

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whatever we did, whatever settlement we came to would be satisfactory to him.

"*Q.* Was there some time before that, when he said what he thought about the amount he should get out of the estate and how much he expected to get?

"*A.* He didn't expect he would get anything.

"*Q.* Did he say so?

"*A.* Yes, sir; he said it was a surprise to him to get anything.

"*Q.* What did he say, if anything, about being satisfied with getting $3,000?

"*A.* He told me he was perfectly satisfied. He said he couldn't come over here on the 2d of February, or the day we agreed to come, because he was working, teaming it. I think Mr. Howlett said, 'Well, it won't be necessary, if these people can act for you.' And in reply to that he said 'Whatever they did is satisfactory,' and then we separated."

Adela Fields testified as to this conversation, as follows:

"First, we thought the claim that Mary Cummiskey put in was too heavy. I learned the amount of her claim through Mr. Van Winkle telling George Newman; I understood that Van Winkle was acting as her attorney in presenting the claim; I think her claim was $5,300. Jimmy La Grange's claim the same; Mrs. Roth's claim $500; that was the talk this day when we were all there. It was talked that Mary's claim was for services and housework there on the farm. It was discussed, as to whether or not she had ever been paid anything; some said she had been paid, and some said she hadn't. I think she had been paid in part anyway. There was a little talk there among us as to what property she had."

William Robison testified that the only subject he could remember being discussed at this meeting was "about Seth Rubert's being guardian," and did not think any other subject was discussed.

The trial judge in his finding states:

"I am of the opinion that Mr. Howlett and Mr. Newman stated the facts correctly."

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If the testimony of Mr. Howlett is to be accepted as stating the facts, and we agree with the circuit judge that the testimony is convincing, it follows that Mr. William Robison, having heard the conversation in Mr. Howlett's office, knew about the mortgages that it is claimed Mr. Robison gave Mary Cummiskey. He was a visitor, two or three times a year, at Mr. Robison's home; during the last 20 years Mary Cummiskey was the housekeeper. As stated, sometimes he would stay there for a week at a time. We cannot agree with the contention that he was deceived at the time the settlement was arranged, as he must have known, from what he heard in Mr. Howlett's office, that Mary Cummiskey had considerable property, and that she had received it from her uncle, David Robison.

The temporary injunction restraining the prosecution of the appeal from the allowance of the claim of Mary Cummiskey should be made permanent, and in this regard the decree of the lower court will be modified; in other respects, it will stand affirmed, with costs to the complainant.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, and OSTRANDER, JJ., concurred with KUHN, J.

BIRD, J. *(dissenting)*. I am of the opinion that this injunction bill should be dismissed, and that the claims of Catherine Roth and Mary Cummiskey should be tried on their merits in a court of law in conformity with the statutory procedure. The showing made at the hearing to enjoin their prosecution in the usual manner is very convincing that neither claim has any merit. The Roth claim is admittedly outlawed, and was at the time it was presented to the commissioners, and should have been rejected by them, as the statute in express terms forbids the allowance of such claims against the estates of deceased persons. 3 Comp. Laws, § 9375. It appears by the

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testimony of two witnesses who were in a position to know the facts that the Cummiskey claim had been paid in the lifetime of the deceased, and that instead of the estate being indebted to her, she was indebted to the estate. This testimony raised a strong suspicion against the honesty of the claim, and fully justified the chancellor in refusing to enjoin its prosecution. The answer of complainants to this is that all the parties in interest agreed upon a "compromise" of the claims against the estate, and therefore no one of them is in a position to prosecute an appeal from the decision of the commissioners in the circuit court. Willie Robison, whose assignee effected the appeal, signed no compromise agreement, nor did he authorize any one to sign it in his behalf. Neither the fact that the Roth claim was outlawed, nor the fact that the Cummiskey claim had been paid, was known to him when it is claimed he ratified the compromise agreement. If he were ignorant of these facts, he would not be bound by the compromise agreement. *Hurley* v. *Watson*, 68 Mich. 531 (36 N. W. 726); *Maxson* v. *Railroad Co.*, 117 Mich. 218 (75 N. W. 459); *Deffenbaugh* v. *Manufacturing Co.*, 120 Mich. 242 (79 N. W. 197); *Leonardson* v. *School District*, 125 Mich. 209 (84 N. W. 63); *Upton* v. *Dennis*, 133 Mich. 238 (94 N. W. 728); *Cowan* v. *Manufacturing Co.*, 141 Mich. 87 (104 N. W. 377).

An effort is made to discredit the testimony of the Ruberts on account of Mrs. Rubert's interest in the estate and for various other reasons. It is true they have a selfish interest to serve in defeating the claims, but it must be remembered that by reason of their nearness to Mary Cummiskey they were in a position to know the facts about which they testified. If, as is contended by counsel, this testimony is unworthy of belief, a jury in the circuit court will doubtless discover it, and give it such credence as it deserves. If the claims are honest ones, they should become a

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charge against the estate on their merits, and not by estoppel.

To further discredit these witnesses counsel attacks the assignment of the claim of Willie Robison to Mrs. Rubert, and calls it unconscionable. The record shows that Willie Robison made an assignment of his interest in the estate to Mrs. Rubert, but it does not show that he has ever expressed any regret that he did so. He makes no complaint that he has been overreached, and asks no relief from this court on account of it, and there would seem to be no good reason why we should concern ourselves with a possible difficulty between these parties in the future.

The order of the chancellor dismissing the injunction as to the Cummiskey claim should be affirmed, and a like order should be entered in the Roth claim.

The defendant should recover her costs in this court.

MAKI v. MOHAWK MINING CO.

1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS—STATUTES—CROSS-EXAMINATION.

Act No. 307, Pub. Acts 1909 (5 How. Stat. [2d Ed.] § 12865), granting to either party the right to call as a witness the opposite party, his agent, or employee, or any one who may have been such agent or employee at the time of the transaction in question and permitting cross-examination, etc., does not deny a defendant the equal protection of the laws.

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2. MASTER AND SERVANT—INSPECTION—SAFE APPLIANCES.
It is the master's duty not only to furnish a safe cable for a hoisting apparatus in its mine, but also to provide reasonable inspection to see that it remains safe.[1]

3. SAME—NEGLIGENCE—EVIDENCE.
Evidence that a cable, having a supposed breaking strain of 7½ tons and a safe working strain of 2½ to 3 tons, parted under a load of about 486 pounds, that the broken end was badly frayed and weak, tended to support plaintiff's claim of negligent failure to inspect.

4. SAME—INSTRUCTING SERVANT—HOISTING DEVICE—USE.
Where plaintiff had no instructions to ascend the shaft by walking up the footwall of the mine in which he was employed, and had been told by the servant to whom he looked for orders and instruction to aid his ascent by taking hold of the bucket, and neither had previously done the work in which they were engaged at the time of the accident, and defendant had provided no ladders, it could not be said that plaintiff assumed the risk or was guilty of contributory negligence for ascending with the aid of the bucket connected with defendant's hoisting device which broke and caused injuries to plaintiff.[2]

Error to Houghton; Streeter, J. Submitted January 22, 1913. (Docket No. 7.) Decided July 18, 1913.

Case by Alex. Maki against the Mohawk Mining Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Allen F. Rees, for appellant.

O'Brien & Le Gendre (George O. Driscoll, of counsel), for appellee.

MOORE, J. The plaintiff was employed in the mine of defendant. While so employed he received injuries

[1] Upon the duty of a master to inspect tools or implements furnished servant, see note in 1 L. R. A. (N. S.) 944.

[2] As to servant's assumption of risk from latent danger or defect, see note in 17 L. R. A. (N. S.) 76.

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for which this suit was brought. From a verdict and judgment of $2,000 in his favor the case is brought here by writ of error.

The errors relied on are grouped as follows:

"(1) The provisions of Act No. 307, Laws of 1909, permitting so-called cross-examination under certain circumstances are unconstitutional.

"(2) There is no evidence in the record of negligence on the part of the defendant.

"(3) There is no evidence in the record of any failure in the duty of the defendant with reference to inspection.

"(4) The defendant company had provided a safe and proper way for ascending the shaft without using the means adopted by the plaintiff.

"(5) On the record in this case the plaintiff was guilty of contributory negligence as a matter of law, and also assumed the risk of injury, under the circumstances of the case.

"(6) The judgment should be reversed because of improper and prejudicial remarks made by plaintiff's counsel in the course of the trial.

"(7) There were errors in the admission of testimony, which should require a reversal of the judgment.

"(8) There was error in the charge of the court with respect to the duty of inspection."

Of these assignments of error counsel say:

"We have considered that the questions raised are dependent directly upon well-known and well-understood general principles relating to actions for personal injuries, and we have, therefore, refrained, to a large extent, from the citation or quotation of specific authorities."

Before the questions involved can be properly considered, a brief statement of facts is essential. The plaintiff is a Finn, and when hurt was something more than 22 years of age. He was employed as a trammer in the mine, until the day of the accident, when he was set to work as a mucker in shaft No. 4, which has an incline of about 36 degrees. The shaft

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was completed to the thirteenth level, and from that point it was sunk to where the fourteenth level was to begin, and the work had begun in cutting out the plats at this level. This work had proceeded down almost perpendicularly for about 20 feet. In doing this work the rock was hoisted in buckets to the thirteenth level. This hoisting arrangement consisted of a trolley cable, rigidly fastened at the upper end to one of the timbers at the thirteenth level and at the lower end to an eyebolt driven into the rock in the hanging wall of the shaft near the bottom. On this cable ran a carriage or trolley. The hoisting rope ran from the puffer engine, which supplied the power, over a guiding pulley at the thirteenth level, and then down to the trolley or carriage, where it passed over a sheave in the trolley down to a sheave on the bucket, and up to a permanent fastening on the trolley. When the bucket was at the bottom of the shaft to be filled, it would rest on the floor of the shaft below the trolley. When the engine was operated the first effect of the winding up of the hoisting rope would be to raise the bucket from the foot of the shaft to the trolley. As the shell of the sheave on the bucket engaged with the trolley, the bucket could go no further in that direction; the effect of the hoisting rope was to pull the trolley itself with the bucket suspended therefrom, up on the trolley cable until it reached the plat, or platform, of the thirteenth level, where the bucket would strike against guiding skids and be dumped.

The plaintiff was sent for the first time into the place where the plat was being cut, on the morning in question, with another green hand, and a third man who was an experienced man, and was called the old mucker. Neither of the other two men had done work of this character before. The record indicates fairly that the old mucker was expected to direct the new men how to work. When dinner time

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came, the bucket had been loaded, and as it started up the shaft the old mucker took hold of it at the rim, with his right hand, and told the plaintiff to take hold of it with his left hand, and the two gave their disengaged hands to the third man, and as the bucket ascended the men followed it, their feet still on the foot wall, and were steadied and partly sustained and pulled by the ascending bucket. They had got out of the nearly perpendicular place and ascended up the shaft, where it was at an angle of 36 degrees some distance, when they let go of the bucket, and after it had passed on about 10 feet the cable parted about 2 feet from the end that was fastened to the trolley or carriage, and the loaded bucket came tumbling down the shaft, and before the plaintiff could get out of the way the bucket struck him and inflicted the injuries for which he sued. The place where the three men worked was at the bottom of the shaft so that, when the bucket began to ascend with its load, and they were at work, they were always below the bucket.

Counsel for appellant has the following to say of the cable which drew the bucket:

"There is no question on the record but that a sufficient rope was furnished. It was the same kind of a rope which had been furnished for all the sinking in the mine. Indeed, it was the same apparatus. The testimony shows without dispute that it was a comparatively new rope; that it was a half-inch wire rope, of which the breaking strain was from 7½ to 9 tons, and the safe working strain or load from 2½ to 3 tons, while the actual load carried by the rope on that slope was about 486 pounds. This load was when it was carrying the loaded bucket."

The plaintiff disputed the statement that the cable was comparatively new. We shall have occasion to recur to this subject later.

Upon the trial a witness was called by the plaintiff who was in the employ of the defendant at the time of the accident, but was not in its employ when called

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as a witness. This gives rise to the first assignment of error which is discussed.

1. Is Act No. 307, Public Acts of 1909 (5 How. Stat. [2d. Ed.] § 12865), unconstitutional? The provisions read as follows:

"Hereafter in any suit or proceeding in any court of law or equity in this State, either party, if he shall call as a witness in his behalf the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true."

It is urged by counsel:

"The pertinent provision of the Federal Constitution is that part of the fourteenth amendment as follows: 'Nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws.' Our own Constitution also provides perfect equality in the law for all persons. * * * Had the legislature confined the operation of the act to cross-examination of persons in the employ of the opposite party at the time of the trial, or at the time of testifying, we might have a different question, as in such a case there may be some presumption that the witness so situated may be, to some extent, under the dominion or influence of the employer, and for that reason the act might be held to have made a proper classification with respect to witnesses; but no classification can be permitted unless there is a just, underlying distinction which will justify such classification. But in attempting to confer this right upon one or two litigants as against the other, under circumstances where there is no possibility of any distinction to justify the granting of such right to one and not to the other, to that extent at least, the

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act must, in its operation and of necessity, put the parties in an unequal position before the court. By it such a law will confer unequal privileges, with no distinction relating to the parties or the witnesses which could justify such a classification."

Counsel cite no authority upon this proposition. The act in question has been construed by this court in *Antosik* v. *Alkali Co.*, 166 Mich. 415 (132 N. W. 80); *Jones* v. *Railroad Co.*, 168 Mich. 1 (133 N. W. 998); *Johnson* v. *Carbide Co.*, 169 Mich. 651 (135 N. W. 1069). In *National Coal Co.* v. *Mining Co.*, 168 Mich. 198 (132 N. W. 88), the witness called was not then in the employ of the opposite party, but it was held that the provisions of the act allowed the witness to be called. It is true the constitutional question was not raised in any of these cases. It is apparent from what we have quoted from the act that its purpose was to do away with a technical rule of evidence, and to facilitate getting at the facts of a given case, so that it might be tried upon its merits. We do not see where this does an injustice to any one. No one has a vested right in a rule of evidence. See 8 Cyc. p. 924; *In re Patterson's Estate*, 155 Cal. 626 (102 Pac. 941, 26 L. R. A. [N S.] 654, 132 Am. St. Rep. 116, 18 Am. & Eng. Ann. Cas. 625). The legislation creates no class and no preferences.

Groups 2, 3, and 8 may be considered together. It was the theory of the defendant that, having furnished a safe cable, it was for the men to make all further needed inspection. It was the view of the judge that, not only must the defendant furnish a safe cable, but that it was charged with the duty of making reasonable inspection to see that it remained safe. There is testimony that the defendant regarded it as the duty of the miners to make the inspection, while they in turn regarded it as the duty of the timber men. The case presents an illustration of the old adage that what is everybody's business is no one's

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business. There is testimony to the effect that after the cable parted the end was cut off, that it was badly frayed, and appeared to be in a weakened condition. It is not a forced inference to say, if a half-inch cable, having a breaking strain of 7½ to 9 tons, and a safe working strain of 2½ to 3 tons, gives way when carrying a bucket which, with its load, weighs 486 pounds, with such added weight as the three men might have imposed upon it, under the conditions stated, that its usefulness as a cable was greatly impaired. Especially so as its parting, whether the men were part way up the shaft or were in the bottom of the hole, might work so disastrously. See *Van Dusen* v. *Letellier*, 78 Mich. 492 (44 N. W. 572); *Morton* v. *Railroad Co.*, 81 Mich. 423 (46 N. W. 111); *La Fernier* v. *Wrecking Co.*, 129 Mich. 596 (89 N. W. 353); *Panela* v. *Mining Co.*, 165 Mich. 329 (130 N. W. 686).

4. It is said the defendant company had provided a safe and proper way for ascending without using the means adopted by the plaintiff. There were no ladders in the shaft, but counsel argues that the plaintiff might have walked up on the foot walls. It has already appeared that plaintiff had never done this work before, and was never in this place before. He had no instructions to go up on the foot wall unaided. He did what he was told to do by the old mucker, to whom he was supposed to look for instructions. What we have said in relation to this feature of the case will dispose of group 5. See Baldwin on Personal Injuries (2d Ed.), § 368; *Johnson* v. *Chemical Co.*, 152 Mich. 84 (115 N. W. 1043).

6. It is said the case should be reversed because of prejudicial remarks of counsel. A reference to the record shows that counsel was examining a witness who evidently thought that he knew more about the conduct of a trial than did court or counsel, and while we cannot commend the conduct of counsel, it may in a measure be excused, especially as there is nothing

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to indicate that it did any mischief. The case was carefully tried, and we find no reversible error.

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred. STONE, J., did not sit.

MOILANEN v. WASHINGTON IRON CO.

1. PLEADING—VARIANCE—APPEAL AND ERROR.
   In the absence of a motion for a directed verdict or any objection to the evidence, on the ground that there was a variance between the declaration and proofs, the point will not be considered on writ of error.

2. SAME—INSPECTION—TRIAL—INSTRUCTIONS TO JURY—MINES AND MINING.
   Where defendant, in an action for personal injuries, sustained in its mine by the falling of rock, claimed that the premises had been adequately inspected two weeks before the fall, but the testimony showed that blasting was done every day in the mine and it had a tendency to loosen the rock, the court properly refused to charge, as requested by defendant's attorneys, that if the place was inspected at the time and in the manner customary in mines of the kind defendant conducted, and such inspection failed to disclose the loose condition of the rock, plaintiff could not recover.

3. APPEAL AND ERROR—WEIGHT OF EVIDENCE—VERDICT.
   A verdict will not be set aside on error if the contention of the prevailing party was supported by affirmative testimony which, if the jury believed it, would sustain the finding.

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4. DAMAGES—EXCESSIVE VERDICT.

Five thousand dollars damages for loss of two fingers and injuries partially disabling the others, *held*, too large, and reduced to three thousand dollars.

Error to Marquette; Flannigan, J. Submitted January 23, 1913. (Docket No. 43.) Decided July 18, 1913. Rehearing denied November 3, 1913.

Case by Aaro Moilanen against the Washington Iron Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reduced and affirmed.

C. F. Button (E. A. Macdonald, of counsel), for appellant.

O'Brien & Le Gendre (George O. Driscoll, of counsel), for appellee.

MOORE, J. The plaintiff was injured while in the employ of the defendant in its mine. He sued, and recovered a judgment for $5,000. The case is brought here by writ of error.

The mine consisted of a single shaft, going down in the ore vein following the dip of the vein, which was at an angle of about 55 degrees. The vein extended north from the shaft, and consisted of a body of ore about 30 feet wide, lying between two well-defined walls, the upper of which was called the hanging, and the lower the foot, wall. Several levels had been driven along the vein from the shaft, overlying each other about 50 feet. The 650-foot level was sometimes called the eighth level. The 700-foot level is 50 feet below the eighth level, and is sometimes called the fourteenth level. Originally these levels were practically tunnels about 7 feet high and 10 or more feet wide. The plan of taking out ore between the eighth and fourteenth levels was to commence on the fourteenth level and excavate a hole, called a

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"raise," about 10 feet square up through the ore and into the eighth level above; then to drive horizontal drifts north and south along the vein out of the sides of the raise; the ore removed from the drifts was sent to the level below, where it was conveyed to the main shaft for hoisting.

Some time prior to the accident the ore lying between the eighth level and the level above had been extracted, leaving a room, or "stope" so called, extending along the vein about 60 feet and about 30 feet wide, and because of the slope or dip of the walls, from 30 feet high in the lowest part to 50 feet in the highest part. Some time prior to the accident the defendant commenced removing the ore between the eighth and the fourteenth levels, and one of the questions of fact is how far this had progressed at the time of the accident. It was the claim of the plaintiff that an opening nearly if not quite 50 feet long had been made between the two levels by taking out the ore, while defendant claims that a raise only about 10 feet square had been opened between them.

The accident was the result of a fall of rock weighing about three tons, from the roof of the room on the eighth level, to the floor of the eighth level, where it broke into two or more pieces, one of which found its way to the fourteenth level, where plaintiff was working, and injured him. It was the claim of plaintiff that there was a failure to inspect the roof of this stope or room, as should have been done. This was denied by the defendant. The testimony upon every phase of the case was as conflicting as it could well be. There was no request for a directed verdict at the close of the testimony.

The record contains three and only three requests to charge on the part of the defendant. They are as follows:

"(1) If you find that the place from which this

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rock fell was inspected by the employees of the defendant company, in the manner and at the times usual and customary in mines of that character, and that said inspections failed to disclose this rock as loose, then your verdict should be for the defendant.

"(2) If you find that the rock in question fell because of the existence of two intercepting seams or slips so called, and that the place from which this rock fell was examined about two weeks prior to accident by all the customary means of examining places of that character in similar mines, and that such examination failed to disclose the presence of such seams, then your verdict should be for the defendant."

"(4) If you find in this case that the mine of defendant was not opened from the eighth level to the fourteenth level so as to leave no protection from the rock which fell, and that the rock fell upon the floor of the level and rolled or jumped into this raise, then the plaintiff cannot recover."

These were not given except as covered in the general charge.

A motion for a new trial was made for many reasons. This motion was overruled, and in doing so the trial judge filed a very elaborate opinion, to some portions of which we shall take occasion to refer later.

The errors assigned and argued by counsel are as follows:

(1) Plaintiff did not recover upon the case made by his declaration.

(2) The undisputed testimony is that the rock which injured plaintiff fell from the hanging wall because of the presence of two intersecting seams, which were not discoverable, and were not discovered by examination. Therefore, the court erred in refusing to give to the jury defendant's request to charge No. 2, and erred in refusing to grant a new trial on the same ground.

(3) The verdict was against the weight of evidence, and the court should have granted a new trial on this ground.

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(4) The verdict is excessive.

Each of these propositions was presented to the trial judge on the motion for a new trial, and are referred to by him in the opinion to which reference has been made.

1. This proposition is argued at great length by counsel. The position of counsel is succinctly stated in this extract from the brief:

"The gist of the declaration, consisting of one count, is that the defendant was negligent because it substantially mined out all the ore between the eighth and fourteenth levels, without leaving pillars or having timbers or other obstructions to prevent rock from above the eighth level falling to the fourteenth level, and because of this condition in failing to inspect above the eighth level, and take down rock found loose. By his testimony the plaintiff attempted to prove that the ore had been removed as claimed for a distance of about 60 feet along the vein to the extent of half or more of the floor of the eighth level on the hanging wall side, leaving a bracket-shaped piece of ground along the footwall, and that the rock struck this part of the floor left, and bounded westerly into this large excavation, leading directly to the fourteenth level, where the plaintiff was.

"The defendant denied that the ore had been mined out, either as claimed by the declaration or as attempted to be shown by plaintiff's testimony, and gave testimony to show that the floor of the eighth level was a flat one, and was intact with the exception of the raise; that it was a part of its mining plan to have the floor so remain, as a protection to those below it, to the latest possible moment; that the rock which fell was a very large one, weighing about three tons; that this rock fell upon the solid floor of the eighth level, about 10 feet north and along the vein from the mouth of the raise, and was there stopped in its downward descent; that in its contact with the floor the rock broke into two or more pieces, and one of the pieces jumped, or in some way found its way southerly and laterally into the mouth of the raise, down which it fell to the injury of the plaintiff below in the fourteenth level."

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Counsel quoted freely from the declaration of the plaintiff, but omitted to quote many parts thereof. The following appeared in the declaration:

"That on the 21st day of August, A. D. 1910, this plaintiff was working as aforesaid in the discharge of his duties as a trammer, to wit, at the fourteenth level of said mine, and to wit, about 150 feet north of the shaft of said mine, and while he, the said plaintiff, was prudently and carefully engaged in the discharge of his duties, and without any fault, negligence, or want of care whatever on his part, and by reason of the said negligence and carelessness of the said defendant, and while this plaintiff was shoveling rock into a car at said fourteenth level, in the ordinary discharge of his duties as such employee of the said defendant, a large piece of rock, ore or other matter fell from the sides, roof, or hanging wall of said mine, to wit, at or near the eighth level in said mine, and thereupon said rock, ore, or other matter rolled with great force and violence down to said fourteenth level of said mine, and upon and against this plaintiff."

Again:

"And also to exercise reasonable and ordinary care, skill, and diligence to inspect, maintain, prop, brace, timber, and secure each and every other place in said mine from which said rock, ore, or other matter was liable to fall upon and roll down to the place where plaintiff would so be, remain, or pass, while engaged in and about the performance of his duties; that it was, furthermore, the duty of the said defendant to use and exercise reasonable and ordinary care, skill, and diligence in and about the pinching, barring down, or otherwise removing any and all loose ore or other loose matter, or any rock, ore, or other matter liable to fall down in any stope or other place in said mine and down to the level at, upon, or near which this plaintiff was at work, and to use and exercise like care, skill, and diligence to remove any pieces of rock, ore, or other matter, which was liable to fall upon or against said plaintiff, and to maim or injure him while engaged in and about the discharge of his

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duties as such servant or employee of the said defendant."

Again:

"That the said defendant failed and neglected to use and exercise like care, skill, and diligence in and about the inspecting, maintaining, propping, bracing, timbering, supporting, securing and protecting each and every place in said mine in or about which defendant ordered, directed, required, suffered, permitted, or expected the plaintiff to work, pass, be, or remain, while he was employed by the defendant as aforesaid, in that the said defendant wholly failed and neglected to inspect, maintain, prop, brace, timber, support, secure, and protect the roof and sides of said mine in and about the place where the said plaintiff had to work, and in and about other places from which rock was likely to fall upon, and roll down to, upon, and against the said plaintiff; that the said defendant failed to and neglected to inspect, prop, brace, timber, and secure such other places in said mine from which rock, ore, or other matter was liable to fall upon, and roll down to the place or places where plaintiff would so be, remain, or pass, while engaged in and about the performance of his duties as such employee of defendant; that the said defendant failed and neglected to exercise reasonable and ordinary care and diligence in and about the pinching, barring down, or otherwise removing any and all loose rock, ore, or other matter, or any ore, rock, or other matter liable to fall down in any stope or room, or any other place in said mine, and down to and upon the level at, upon, or near the place this plaintiff was or would be at work, and allowed and permitted several places in said mine from which rock was liable to fall to the place where plaintiff was so employed from time to time, in an unsafe and dangerous condition, in that the roof and sides thereof were loose, and the superincumbent ore, rock, or other matter was liable to fall from said roof, and roll down said mine to the place where plaintiff was so working as aforesaid."

It is true that the plaintiff and defendant do not agree as to the situation in the mine of the opening between the eighth and fourteenth levels; but they do

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agree about where the plaintiff worked when he was hurt, and that he was hurt by the falling of a mass of rock which came from the roof of the eighth level; the plaintiff claiming that the roof was not properly inspected, and the defendant claiming that it was.

In respect to this contention the trial court said in the opinion to which reference has been made:

"The position of the defendant is that the plaintiff, by his declaration and opening statement to the jury, confined himself to the theory respecting the manner of the accident that the ore was mined out between the eighth and fourteenth levels about 50 feet lengthways the vein and from foot to hanging, except a bench of ground on the footwall side of the raise; that the piece of ore or rock which injured the plaintiff fell from the back of the eighth level directly into the raise and against the plaintiff; and confined himself to the claim of negligence, in the manner of excavating the ore, in not providing a cover or obstruction of some kind to prevent ore and rock falling in the raise from the eighth level, and in not inspecting the back of the stope in view of such open and uncovered excavation.

"The defendant further insists the plaintiff should not have been permitted to abandon the foregoing theory as to the manner of the accident, and recover on the other theory that the rock fell from the back to the floor of the level, that it then broke, and a part of it rolled or bounded into the raise; that the defendant, in the exercise of reasonable and ordinary care and diligence, should have anticipated that if the rock fell from the back to the floor it would break, and part of it roll or bound into the raise; that it was the duty of the defendant to use reasonable and ordinary diligence to inspect and test the place from which the rock fell, and by continued inspection and testing of such place, at such intervals as the reasonable conduct of its business of mining, in view of all the circumstances disclosed by the evidence required; and that it failed in the performance of such duty.

"The dimensions of the raise or opening, whichever it may be called, between the eighth and fourteenth levels is not material. Whether the opening was 10

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feet square or 50 feet square is beside the question. That there was an opening there not only large enough to admit the rock which injured the plaintiff, but large enough to admit a rock large enough to kill 20 men, must be conceded.

"The plaintiff was about his regular work, conducting himself prudently and without negligence, at the lower end of the opening, and whether the opening was 10 or more feet square, it was the duty of the defendant to protect the plaintiff against rock falling therein, either by properly covering the opening or vigilant inspection of all ground from which material might reasonably be expected to fall, and falling, find its way into the raise."

The important question is, Was the declaration full enough to advise the defendant, so that there might be a full trial upon the merits? There was no objection by the defendant to the admission of testimony on account of variance. There was no suggestion made to the court at the close of the testimony that he direct a verdict because plaintiff had not made the case stated in his declaration. The defendant entered fully into a trial upon the merits. The testimony was conflicting; it was submitted to the jury, which found against defendant. See *Stone* v. *Covell,* 29 Mich. 359; *Merkel* v. *Bennington Township,* 68 Mich. 133 (35 N. W. 846); *Plumb* v. *Hecla Co.,* 157 Mich. 562 (122 N. W. 208); *Hunter* v. *Township of Dwight,* 157 Mich. 634 (122 N. W. 267).

2. We now come to the second proposition. Did the court err in not giving defendant's second request to charge? A reference to that request which we have quoted herein will show that it proceeds upon the assumption that, if an adequate inspection was made two weeks before the accident, defendant would be relieved of liability. The testimony is that blasts were made every day, and that the tendency thereof was to dislodge rock in the hanging wall. While the

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judge did not, and we think very properly, give the second request, he charged the jury as follows:

"But, gentlemen, the defendant is not responsible to the plaintiff for defects not discoverable by ordinary, reasonable, and prudent inspection and testing; and the defendant in this case was not bound to inspect or test more often, or more minutely, or in any manner other than would an ordinarily prudent person engaged in the same business inspect or test under similar circumstances and conditions.

"Again, gentlemen, if the dangerous condition of this rock could not have been discovered upon an ordinary, careful, and prudent inspection or test, then the defendant is not liable for the injury which resulted to the plaintiff.

"Again, gentlemen, if the dangerous condition of the rock might have been discovered by inspection or test, yet if the defendant did use reasonable and ordinary diligence to inspect and test the place from which the rock fell, and did inspect and test the same as often, and as minutely, and in the usual and customary manner as would ordinarily prudent persons engaged in similar business inspect and test under similar circumstances and conditions, then the verdict must be for the defendant. You understand from this, gentlemen, that the defendant is not bound at the peril of liability for an accident to absolutely discover a defective condition of that wall, but it is bound and was bound to use ordinary and reasonable care and diligence to discover the defect in that rock. If it did not perform that duty, it is liable to this plaintiff; and if it did perform that duty, even though the accident resulted, it is not liable to the plaintiff."

There was a sharp controversy upon the question of inspection which raised a question of fact, which we think was properly submitted. *Scendar* v. *Copper Co.*, 169 Mich. 665 (135 N. W. 951).

3. Was the verdict so against the weight of evidence that we ought to set the result aside? Counsel for plaintiff say this question is not open to defendant because not presented to the trial court, or if presented was not urged as appears by his opinion.

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Waiving this contention for a moment, we are prepared to say that unless we are to enter upon the province of the jury in determining controverted questions of fact, where the differences between the parties is supported by affirmative testimony which, if believed by the jury, would sustain the verdict, we ought not to set this verdict aside.

4. Is the verdict excessive? In disposing of that question the trial judge said, in part:

"It is true, as the doctor said, the plaintiff can do manual labor, and earn about the same wages as before the accident, provided he is always able to obtain labor a man can do with a right hand such as his. The difficulty lies in the fact that he will not be able to perform as many kinds of manual labor as formerly. He has lost a choice of employment. He must now seek what he can do, not what he would prefer to do. His ability to obtain employment in the future is impaired because he is not, like a man with two good hands, able to do all kinds of common work. In addition, there is the pain he has already suffered, and the humiliation he has and always will suffer, owing to the deformity, humiliation of the kind that will prompt him to offer his left hand as often as he meets a friend. * * * While the verdict was liberal, the testimony furnishes no basis for saying it was clearly excessive."

Not much space is given in the record to a description of the injury of the plaintiff. The mining doctor was called as a witness on his behalf. His testimony impresses us with its fairness. He describes the injury as follows:

"I found the condition of his hand was a fracture of the second and third fingers and a fracture of the metacarpal bones back of the first finger; and the blood supply to the first two fingers being destroyed by the smashing force of the injury, it was necessary to amputate. There was no blood left for the healing of these fingers. They were all splintered up, and I had to amputate the second and third fingers. The condition in which the other two fingers was left by

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the operation and the injury combined was that there was a compound fracture of the metacarpal bones back of the first finger, and there was about one-half inch of denuded bones, the periosteum destroyed; and I had to remove from a quarter to a half inch of the bone in that finger. The vacant space in between the two has been filled with new bones and callous, and the healing was made complete in that metacarpal bone. That left him with the little finger and thumb not injured in any way; it left the index finger somewhat deformed, and with some stiffness in same. The little finger and thumb are uninjured. The third finger was broken. It is not only an amputation of the finger, but amputation back of the finger. The second finger is amputated at the first joint. The index finger is uninjured so far as the finger is concerned. At the time of the accident, the index finger was denuded of skin for a ways; new skin has now grown in and drawn over from the other side. The injury went clear through the hand, and came out and up the middle of the palm. I removed from a quarter to half an inch of dead bone from the index finger, leaving a limited action in that finger. These injuries are permanent as far as amputation of the two fingers are concerned. My belief is that the stiffness of the index finger will become better as time goes on. I would not say that the hand is useless. I think he could use it for any ordinary laboring work. There would not be as much strength in the hand with the two fingers amputated as there was before. I believe the plaintiff can do manual labor with that hand, and earn about the same wages as he did before. I don't think he could do tramming. I imagine he could do rock picking though; he could do rock picking with that hand; he has got the grasp of that thumb and forefinger. For the first years the scars are more tender, but they get tougher with time."

The plaintiff's own testimony shows that he has since worked and earned $1 a day and upwards. It is not a question of what one would take to have such an injury done. The question is, The injury having been done, what is fair compensation for the injury? We recognize the advantage the trial judge has from

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having seen the injured party and seen and heard the witnesses in determining a question of this sort; but a reading of the record constrains us to say that we think the amount of the verdict and judgment is too large.

Unless the judgment is remitted to the sum of $3,000 within 20 days from the filing of this opinion, the case will be reversed, and a new trial ordered. If this remission is made, the case will stand affirmed for that amount, with costs to defendant.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

GANSSER v. VANDERVEEN.

1. MUNICIPAL CORPORATIONS—VILLAGE ATTORNEY—APPOINTMENT—PUBLIC OFFICERS.

   Unless the common council of a village organized under the general law (1 Comp. Laws, § 2700, 3 How. Stat. [2d Ed.] § 5919), creates or establishes the office of village attorney by resolution or by ordinance, the village president has no authority to appoint an attorney: the sole power of employing an attorney is in the council.

2. SAME—COMPENSATION—MANDAMUS.

   Where the president of the village of East Grand Rapids announced to the council that he did not deem it necessary to hire a village attorney by the year, and the council thereupon adopted a motion to employ relator for the year 1912 at a salary, no village attorney having been provided for by ordinance or resolution, relator was entitled to the writ of mandamus to compel the president and clerk to sign an order on the treasurer for his compensation.

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3. COSTS—MANDAMUS—MUNICIPAL CORPORATIONS.

On mandamus proceedings to compel the president and clerk of a village to sign an order for the salary of an attorney, employed by the village, costs will be allowed only against the president who refused to sign the order, not as against the clerk who had signed it.

Certiorari to Kent; Perkins, J. Submitted February 18, 1913. (Calendar No. 25,442.) Decided July 18, 1913.

Mandamus by Emil B. Gansser against Harry Vanderveen, president, and Charles F. Sargeant, clerk, of the village of East Grand Rapids, to compel respondents to sign and deliver to relator an order on the village treasurer. An order granting the writ is reviewed by respondents on writ of certiorari. Affirmed.

Emil B. Gansser (Charles E. Ward, of counsel), *in pro per.*

Smedley, Linsey & Lillie, for respondents.

PER CURIAM. Respondents by writ of certiorari bring this case here to review and reverse the action of the Kent circuit court in certain mandamus proceedings had before it. The facts in the case are stipulated.

The dispute arises between relator, who claims that he was employed as attorney for the village of East Grand Rapids for the year ensuing May 20, 1912, and respondents Vanderveen, president, and Sargeant, clerk, of said village, in relation to the refusal of respondents to sign and deliver to relator an order upon the treasurer of said village for pay for his services for three months as such village attorney.

The village of East Grand Rapids was, by operation of law, reincorporated under the provisions of the general act for the incorporation of villages in this

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State, being Act No. 3 of the Public Acts of 1895, and has since continued in the exercise of its powers and privileges under said act. The legislative authority of the village is vested in the council, consisting of a president and six trustees, elected thereto, and the village clerk is clerk of the council. Relator had acted as village attorney for this village for several years prior to 1912. May 15, 1907, he was employed by the council for one year as attorney for the village at a specified salary. In the four years following, when the village presidents presented their choice of appointments for office to the council, as required by law, the relator was also designated for village attorney, which designation was adopted, confirmed, and ratified by the council.

The statute in question providing for the appointment of officers by presidents of villages, being section 2700, 1 Comp. Laws (3 How. Stat. [2d Ed.] § 5919), reads as follows:

"The president shall, by and with the consent of the council, appoint a village marshal and a street commissioner, and such other officers as shall be provided for by resolution or ordinance of the council, and the council may, from time to time, provide by ordinance or resolution for the appointment of such other officers, whose election or appointment is not herein specially provided for, as they shall deem necessary for the execution of the powers granted by this act, and the powers and duties of such officers shall be prescribed by the council."

The act does not provide for the office of village attorney, and the village council has not created or established such office, either by ordinance or resolution.

At a meeting of the council held May 20, 1912, respondent Vanderveen read the following communication:

"Inasmuch as it is not necessary for the village to be at the expense of hiring a village attorney, hired by the year, I deem it for the public interest that Emil

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B. Gansser be removed from said office, and under the authority of the statute, I do therefore remove said Emil B. Gansser from the office of village attorney.

[Signed] "HARRY VANDERVEEN,
"President."

After this communication was read, the following motion was made by one of the trustees and duly supported:

"Moved that Emil B. Gansser be employed for the year 1912 as village attorney and the salary be fixed the same as the past year."

This motion was put by respondent Vanderveen, who presided, and four trustees voted in favor of it. Thereupon respondent declared the motion carried. This respondent claims he put this motion under protest, and after he declared it carried he gave notice that he would not appoint relator.

At the council meeting held August 18, 1912, relator's bill for services for the months of May, June, and July was presented to the council and a motion to pay the bill, duly supported, was made by one of the trustees, put by respondent Vanderveen, and four trustees voted in favor of it. The said respondent declared it carried, after which he would not sign the order for it because relator was not attorney for the village. Upon request by relator respondents each refused to sign the order. It appears that later respondent Sargeant, as village clerk, signed it. Afterwards relator began proceedings before the circuit court for Kent county, in mandamus, asking for an order to show cause why a peremptory writ should not issue against these respondents, and that they be compelled to issue the order and sign it in their official capacities.

Respondents contend before this court that the court below was in error in granting such writ for the following reasons:

(a) That relator was never appointed village at-

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torney in East Grand Rapids; *(b)* that the action of said village council in attempting to appoint relator as village attorney was illegal and void; *(c)* that under the laws of the State of Michigan relator could only be appointed by the village president with the consent of the council of said village.

The principal and only question necessary to be considered is the last one relied upon by respondents. The statute quoted is not ambiguous. It makes provision that—

"The president shall, by and with the consent of the council, appoint a village marshal and a street commissioner, and such other officers as shall be provided for by resolution or ordinance * * * from time to time."

It is admitted that the village council has not created or established the office of village attorney, either by resolution or ordinance. It follows that the statute gives to the village president no authority to appoint a village attorney. The services of a village attorney could be secured for the village of East Grand Rapids only through the action of its council.

The action which the council took immediately following the communication of the president that he had removed the relator from his office was regular, and by it the relator was employed as attorney for the village for the period indicated. Whether the action of the president in announcing the removal by him of relator as village attorney was regular or not is not a question for us to consider. The fact that for the four years next preceding 1912 the then president each year presented relator's name for appointment as village attorney, or that he put the motion by which relator was employed under protest, is of no consequence. In each instance his employment was effected by the village council, the only body having authority to act in the premises. Under such employment he was entitled to the compensation fixed by

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the council. The circuit court was not in error in granting a peremptory writ of mandamus, and its action is affirmed.

In view of the fact that respondent Sargeant has signed the order in question, the costs of this court will be allowed only against respondent Vanderveen.

HOWE *v.* BENEDICT.

SPECIFIC PERFORMANCE—ESTATES OF DECEDENTS—EVIDENCE.

Complainant and his family who resided in Texas came to Michigan in reliance on the promise of his stepmother to give him her farm at her death, in consideration of his caring for her and running the farm. During ten years and upwards complainant carried out the arrangement, evidenced by letters and other competent proof. Decedent made a will in pursuance of the conditions of the agreement, but it was not found at her death. By a prior will, which was probated, deceased left a life estate in the farm to complainant. There was evidence of a substantial performance of the contract. At the time of her death, decedent was 86 years of age. *Held*, that the contract should be specifically enforced.

Appeal from Ionia; Davis, J. Submitted June 5, 1913. (Docket No. 36.) Decided July 18, 1913.

Bill by Martin L. Howe against Alfred Benedict and others for specific performance of a contract of Rhoda A. Howe, deceased. From a decree for complainant, defendants appeal. Affirmed.

R. A. Hawley, for complainant.

F. C. Miller, *James Scully*, and *Fred L. Warner*, for defendants.

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BROOKE, J. The bill of complaint in this cause is filed for the purpose of compelling specific performance of a contract alleged to have been entered into between complainant and one Rhoda A. Howe. It appears that complainant was a stepson of said Rhoda A. Howe (now deceased). Her son, Ernest C. Howe, a half-brother of complainant, inherited from his father 40 acres of the land in question. To this farm he added by purchase until, at his death in 1897, he owned 95 acres. Dying intestate, Ernest's sole heir was his mother, Rhoda. She made a lease of the farm for three years to Alfred Benedict, a son of her only brother. This lease expired March 1, 1900. At this time Rhoda was 76 years old. She had made a will in 1897 by the terms of which all her estate, both real and personal, was devised and bequeathed to complainant and his wife, Leona, so long as either of them should live, with remainder over to her brother, Leander A. Benedict, if living, and if not, then to his heirs.

Prior to the fall of 1899 complainant had lived many years in Texas, where, with his wife and family, he was engaged in farming. During the summer and fall of 1899 Rhoda A. Howe wrote many letters to complainant urging him to come North with his family and undertake the management of the farm and the care of herself. In these letters she repeatedly promised that in case he would come he should have the farm at her death, and in one dated June 22, 1899, she said:

"I have arranged so after I am gone the place will be yours. It is a good home, and I want you to have it."

Again, under date of July 26, 1899, she said:

"I hope I may live to see you here and settled; it is all I have to live for. I have done all I could to make it all right with you."

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Aside from these letters there is an abundance of evidence of a contract between Rhoda A. Howe and complainant to the effect that if he would move onto the farm and care for her during the remainder of her life he should have the farm. It is established, too, that some time in the year 1899 she actually made a will, leaving her entire estate unconditionally to complainant. This will was not found at her death, but the earlier one of 1897 was found and was admitted to probate.

Relying upon the contract, complainant came North in the fall of 1899 and went upon the place in the spring of 1900; his family following him shortly thereafter. Rhoda A. Howe lived until September 23, 1910. At the time of her death she was upwards of 86 years of age, and for more than 10 years had been the beneficiary of the contract she had made with complainant. The record contains no evidence tending to show that during all these years complainant failed in his duty, under his contract, towards this very old lady, who at times was somewhat unreasonable and hard to get along with.

There is no doubt, as insisted by appellants, that contracts of this nature must be established by competent evidence. *Kimball* v. *Batley*, 174 Mich. 544 (140 N. W. 915).

Complainant in the case at bar has shown with unusual clarity the contract, its acceptance and performance by himself, and the enjoyment of its beneficial provisions by the deceased during a long series of years. Under such circumstances equity demands its specific performance. *Root* v. *Snyder*, 161 Mich. 200, 213 (126 N. W. 206), and cases cited.

The decree is affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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SILVERSTONE v. LONDON ASSURANCE CORPORATION.

1. VENUE—MOTIONS—CHANGE OF VENUE.
   Change of venue for the convenience of parties or witnesses is discretionary with the trial court, and an order denying the motion may only be reviewed in case of a clear abuse of discretion.

2. SAME.
   Accordingly, it was not reversible error to deny a motion for change of venue from St. Clair to Wayne county, in an action on certain fire insurance policies, upon defendant's showing that its witnesses were in the city of Detroit, that plaintiff resided there, and the expense of bringing the witnesses to the St. Clair circuit would be considerable, where plaintiff filed a showing that defendants had made threats to delay the case, to annoy plaintiff, and that in the Wayne circuit, a year or upward would elapse before the cause could be reached, that many of defendant's witnesses were insurance men who were away from home much of the time and could easily attend a trial in St. Clair county.

3. INSURANCE—TRIAL—BURDEN OF PROOF—INSTRUCTIONS.
   In an action for a loss under insurance policies covering plaintiff's stock of merchandise, which defendant claimed and produced evidence tending to show plaintiff had set on fire, it was erroneous to charge that "unless the defendant has produced proof that clearly convinces you that plaintiff purposely caused the fire," the defense was not established.

4. SAME.
   Where there was evidence of suspicious circumstances surrounding the fire, and plaintiff was the last person in the store before the fire broke out, and there was testimony of plaintiff's financial embarrassment, and excessive claim of loss, it was a question of fact for the jury to determine whether he caused the loss.

5. EVIDENCE—BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE.
   The jury need not be clearly convinced that plaintiff started a fire which caused a loss on his insured property; he is not entitled to recover if defendant establishes its de-

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fense to an action on the policy by a preponderance of the evidence.

6. TRIAL—CHARGE—CONTRADICTORY INSTRUCTIONS.
If conflicting instructions are given to the jury, it will be presumed that they may have followed that which was erroneous, and the verdict will be set aside, on error.

7. FRAUD—CROSS-EXAMINATION—LIMITATION.
In cases involving a charge of fraud, wide latitude should be allowed on cross-examination of the party charged with the unlawful conduct.

8. TRIAL—REQUESTS TO CHARGE—INSTRUCTIONS.
The trial court is not required to give requests to charge that single out a particular transaction or the testimony of a particular witness; if the matter is covered by a general charge which brings the entire evidence upon the given subject to the attention of the jury, the appellant may not complain.

Error to St. Clair; Tappan, J. Submitted June 6, 1913. (Docket Nos. 12, 13, and 14.) Decided July 18, 1913.

Assumpsit by Morris M. Silverstone against the London Assurance Corporation. Actions against the Northern Assurance Company, Limited, of London, and against the Sovereign Fire Assurance Company of Canada were consolidated by stipulation and tried with said cause. Judgment for plaintiff. Defendants bring error. Reversed.

Bernard B. Selling and *James A. Muir*, for appellants.

Walsh & Walsh, for appellee.

STONE, J. Writs of error in the above-named cases were sued out to review judgments for the plaintiff for the full amount insured in the several policies involved in the circuit court for the county of St. Clair. The three cases were by stipulation tried together. The amount of insurance involved here is $5,000; $4,600 on stock in trade and $400 on fixtures. This

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insurance was divided as follows: The London Assurance Corporation, $1,600 on stock and $400 on fixtures. Policy issued April 11, 1911. The Sovereign Fire Assurance Company of Canada, $1,000 on stock. Policy issued September 30, 1911. The Northern Assurance Company, Limited, of London, $2,000 on stock. Policy issued September 30, 1911.

The stock (millinery, hair goods, notions, etc.) and fixtures covered by the policies were contained in the downstairs of the store building 450 Gratiot avenue, city of Detroit. The upstairs was occupied by third persons as a dwelling. The fire occurred on Saturday, January 13, 1912, at about 11:10 p. m. No question is raised upon the pleadings. The defenses asserted by the defendants are: *(a)* Wilful burning by the insured; and *(b)* wilful false swearing.

The evidence shows that the plaintiff resided in the city of Detroit and that he first commenced business in that city in the spring of 1908, renting a store at 378 Gratiot avenue. About a year after, he moved into the upper story of the last-mentioned building and resided there with his family. There was a barn upon the premises, which the plaintiff claims he used for the purpose of storing his goods, and that some were stored in the dwelling above the store. Plaintiff opened the additional store, called the "New Store," 450 Gratiot avenue, in the month of April, 1911, and from that time on until the fire in question he occupied and ran both stores.

The testimony in the cases is very voluminous and covers the entire period in which the plaintiff was engaged in business in the city of Detroit. During this period the plaintiff made numerous statements to the banks with which he dealt and to commercial agencies with reference to his financial condition, especially while conducting the store at 378 Gratiot avenue. It was the claim of the plaintiff upon the trial that previous to the opening of the store at 450

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Gratiot avenue he had goods stored in the barn upon the premises at 378 Gratiot avenue and upstairs in the dwelling, varying in value from $2,500 to $4,000, and that these goods were not embraced in any of the above-mentioned statements. This stock he called his "reserve stock;" that after the opening of the store at 450 Gratiot avenue he moved into it the reserve stock which had been stored in the barn and dwelling house above referred to and bought other goods; and he gave evidence to show that the value of his stock at 450 Gratiot avenue at the time of the fire was upwards of $7,000, exclusive of the fixtures.

After the defendants had entered the plea of the general issue, with notice thereunder of special matter, they made a motion for a change of venue to the Wayne circuit court. This motion was based upon affidavits showing that the defendants were foreign corporations; that the plaintiff was a resident of the city of Detroit; that the witnesses in the cases, both for plaintiff and defendants, were residents of the city of Detroit; and that the expense of bringing witnesses to the St. Clair circuit would be large. The plaintiff filed an affidavit in opposition to the motion, in which, among other things, he swore that soon after the fire representatives of the defendants had threatened to cause the plaintiff trouble and annoyance, and also that they had threatened his arrest, and had circulated reports concerning plaintiff which had resulted in injuring his credit and standing in the city of Detroit; that they threatened that if he did not settle for a small amount they would delay the cases he might commence so as to keep him out of his money as long as possible, and had stated that they would keep the cases in court for several years. The affidavit further stated that it took fully a year after the commencement of a case in the Wayne circuit court before it could be reached, and that generally a case was not tried there within a year and a half after its

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commencement; that plaintiff had employed counsel residing at Port Huron, where the St. Clair circuit court was held, and where the condition of the docket was such that the cases could be reached within a few months after being commenced there, and that Port Huron was a place easy of access from Detroit; that many of the witnesses of defendants were insurance men, and, while some of them made Detroit their headquarters, still they were away from home much of the time and could attend the trial in St. Clair county without inconvenience, and that plaintiff's financial condition was such that a speedy trial was important to him. This affidavit was met by an affidavit of the defendants showing that cases were frequently advanced for trial in the Wayne circuit court, and many other circumstances tending to show that trials in the Wayne circuit court could be seasonably reached. This motion was submitted to the circuit court and denied. Exception was taken by defendants, and it is made the basis of the first assignment of error.

1. This matter seems to us to have been one within the fair judicial discretion of the trial judge, and, unless it can be said that that discretion was abused, this action of the circuit judge should be affirmed. It will be noted that this motion was made after the defendants had pleaded in bar to the declarations, and that all of the defendants are nonresidents of the State of Michigan.

We need but cite the cases of *Haywood* v. *Johnson*, 41 Mich. 598 (2 N. W. 926); *Atkins* v. *Borstler*, 46 Mich. 552 (9 N. W. 850); and *Cofrode* v. *Wayne Circuit Judge*, 79 Mich. 332 (44 N. W. 623, 7 L. R. A. 511), to show that the provisions of section 10216, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12869), does not apply to the instant cases.

In the case of *People* v. *Swift*, 172 Mich. 473 (138 N. W. 662), it was said:

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"In the early case of *Greeley* v. *Stilson*, 27 Mich. 153, it was said:

"'A motion for change of venue is, unless where otherwise provided by law, a matter which rests in discretion, and is not a subject for review.'

"It is, however, now recognized that where rulings on such motions are a clear abuse of discretion, manifestly subversive of justice, they may be reviewed and corrected on writ of error."

And we also said in *Johnson* v. *Burke*, 167 Mich. 349-354 (132 N. W. 1017), referring to *Haywood* v. *Johnson*, *supra*, that it appeared in that case the question was raised by motion supported by affidavit before pleading; and that, after a defendant in a transitory action had pleaded in bar of the action and submitted himself to the jurisdiction of a court of general jurisdiction, he must be held to have waived the question of jurisdiction of the person. Can we say, as matter of law, that here was a clear abuse of discretion manifestly subversive of justice?

The convenience of the parties, as well as of their witnesses, is to be considered by the court in such a case. It would appear that even in the State of New York, where the court passes upon the question as a primary one, and not simply upon the ground of abuse of discretion, it has been held that the question of delay in trial is a proper question to be considered in a motion for change of venue, and that the convenience of witnesses is not entirely subserved by the consideration of accessibility, and that the condition of the calendar and the duration of the terms are equally relevant. *King* v. *Vanderbilt*, 7 How. Prac. (N. Y.) 385; *Archer* v. *McIlravy*, 86 App. Div. (N. Y.) 512 (83 N. Y. Supp. 727). We cannot say that there was here an abuse of discretion; and, in our opinion, the court did not err in overruling the motion for change of venue.

2. We cannot undertake to quote at length from the

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testimony in these cases; neither is it necessary to do so in order to consider the meritorious questions presented by the assignments of error.

It was the claim of defendants that the evidence tended to show that there were many suspicious circumstances surrounding the fire; that it was impossible that the quantity of goods claimed to have been burned could have been contained in the place covered by the fire; that there was evidence tending to show that the plaintiff's business was a losing one; that he was embarrassed in his financial circumstances and in urgent need of money at the time of the fire; that the bank with which he dealt had refused to loan him money; that he had no such quantity of goods in stock as claimed; that he sent his sole employee away from the store on the night of the fire much earlier than usual; that he followed her to the other store, and then later returned to the store at 450 Gratiot avenue, where the fire occurred; that the fire started in a remote part of the store, away from the stove, and that the plaintiff was the last person in the store before the fire; and that the fire was in a place not accessible to any one but the plaintiff at that time. It was further claimed that the plaintiff had had some difficulty with his wife, and there were many other circumstances in evidence which, it was claimed, threw suspicion upon the plaintiff and his conduct.

The circuit judge submitted the question of wilful burning to the jury in the following language:

"In considering these questions of fact I do not deem it necessary for me to particularize the proofs of the parties that may tend to support the claims of each. These have been presented to you during the trial and on the argument, and much of the material proof has thus been presented many times over. As to the question whether the plaintiff himself set fire to the building or stock, as claimed by the defendant company, you are instructed that there being no direct

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proof that plaintiff caused the fire the fact can only be established by circumstantial evidence. You will recall all of these circumstances as detailed by the evidence. This includes, of course, the financial condition of the plaintiff, the statement made to the commercial agencies, the amount of stock actually in the store at the time of the fire, and all the circumstances concerning the closing of the store on the night of the fire as detailed by the evidence. In order to find that plaintiff purposely caused the fire and the consequent loss, you must be convinced that the greater weight of this circumstantial evidence establishes this fact. Unless the defendant has produced proof that clearly convinces you that plaintiff purposely caused the fire for the purpose of collecting the insurance in question, this defense has not been established. If such fact has been established by the proofs, then the case is at an end and your verdict must be for the defendant."

There was a motion for a new trial, and one of the grounds of the motion was that the court erred in instructing the jury that—

"Unless the defendant has produced proof that clearly convinces you that the plaintiff purposely caused the fire for the purpose of collecting the insurance in question, this defense has not been established."

The motion for a new trial was denied and exceptions duly entered, and the same question is raised by the assignments of error.

In his opinion overruling the motion for a new trial, the learned circuit judge in part said:

"The question as to plaintiff's setting fire to the stock in question was finally submitted to the jury despite the fact the court had concluded that the proof did not warrant it. At the close of the proofs and on discussion of the requests to charge, the court informed counsel for both parties that he did not consider the proofs sufficient to raise a question of fact for the jury on this issue. Counsel for plaintiff stated that, while he was of the same opinion, yet it might

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be best to submit this question to the jury, together with all other facts and issues raised. While doubting the propriety of thus submitting a question upon which the proofs raised no issue, the matter was finally submitted. It is now my conclusion that there were no proofs received that would warrant the jury in finding that plaintiff set fire to the stock of goods as alleged, and that it is therefore wholly immaterial whether or not the instruction given correctly stated the law as to the proof required to establish the charge of arson."

After a careful reading of this entire record, we are unable to agree with this statement of opinion of the trial judge. There was, in our opinion, sufficient in the evidence to carry this question to the jury; the charge being one of fraud and misconduct on the part of plaintiff. The evidence presented peculiarly a question of fact for the jury. Without characterizing these circumstances, as claimed by the defendants, we think that they were matters to be addressed to the jury, who saw the witnesses and heard the testimony. It cannot be said that the testimony did not tend to prove the wrong claimed. *Peoples* v. *Evening News Ass'n*, 51 Mich. 11-17 (16 N. W. 185, 691); *Barnett* v. *Insurance Co.*, 115 Mich. 247 (73 N. W. 372).

It therefore being proper to submit this question to the jury, we are constrained to say that the court was in error in requiring a greater weight of proof than the ordinary preponderance of evidence and in requiring that the defendants should produce proof which would clearly convince the jury that plaintiff purposely caused the fire. This court said in an early case:

"There is no rule of law which adopts any sliding scale of belief in civil controversies." *Elliott* v. *Van Buren*, 33 Mich. 52 (20 Am. Rep. 668).

The following cases will be found to be controlling upon this subject: *Watkins* v. *Wallace*, 19 Mich. 57-

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77; *Elliott* v. *Van Buren, supra; Peoples* v. *Evening News Ass'n, supra; Monaghan* v. *Insurance Co.*, 53 Mich. 238-255 (18 N. W. 797); *Ferris* v. *McQueen*, 94 Mich. 367 (54 N. W. 164); *Gumberg* v. *Treusch*, 103 Mich. 543-555 (61 N. W. 872); *Hoffman* v. *Loud*, 111 Mich. 156-158 (69 N. W. 231); *McNaughton* v. *Smith*, 136 Mich. 368 (99 N. W. 382); *Arnold* v. *Harris*, 142 Mich. 275-278 (105 N. W. 744); *Walsh* v. *Taitt*, 142 Mich. 127-132 (105 N. W. 544); *J. H. Worden Lumber, etc., Co.* v. *Railway Co.*, 168 Mich. 74-77 (133 N. W. 949); *Madill* v. *Currie*, 168 Mich. 546-560 (134 N. W. 1004).

But it is contended by plaintiff's counsel that the entire charge, when taken together, stated the law correctly, and our attention is called to the following excerpt:

"To establish these defenses, or either of them, the defendant company is in duty bound to produce a preponderance or greater weight of evidence and such proofs as convince your minds that plaintiff is guilty of such fraud and burning as voids the policy and prevents recovery."

If it were to be conceded that the rule is here stated correctly, this court has frequently held that when conflicting charges are given, one of which is erroneous, it is to be presumed that the jury may have followed that which was erroneous, and the verdict will be reversed. *Grand Rapids, etc., R. Co.* v. *Monroe*, 47 Mich. 152-154 (10 N. W. 179); *Madill* v. *Currie, supra.* We are constrained to hold that the portion of the charge covered by the exception and assignment of error above referred to constituted prejudicial error, for which the cases must be reversed.

3. We have examined the assignments of error relating to the cross-examination of witnesses and are of opinion that the trial court applied too strict a rule in the cross-examination of the plaintiff and his wife

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by defendants' counsel, relating to plaintiff's conduct. Where fraud is charged, a great latitude in cross-examination should be allowed. *Barnett* v. *Insurance Co., supra.* We refer particularly to assignments of error 14, 15, and 23.

4. While the trial court refused to give certain of the requests of defendants' counsel which are complained of in the assignments of error, an examination of the entire charge shows that the questions covered by the requests were fairly submitted to the jury, and we do not think it was the duty of the court to single out a particular transaction, or the testimony of a particular witness in the case, but that it is better practice to challenge the attention of the jury carefully to the entire evidence upon the subject. This seems to have been done by the trial court. We find no other reversible error in the record.

For the error in the charge above pointed out, the judgment in each case is reversed, and new trials are granted.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

EIKHOFF *v.* CHARTER COMMISSION OF THE CITY OF DETROIT.

1. STATUTES—CONSTRUCTION.

It is a well-established rule of statutory construction that where powers are specifically conferred they cannot be extended by implication: it is to be inferred that no other or greater power was given than that which the statute specifies.

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2. MUNICIPAL CORPORATIONS—DETROIT CHARTER COMMISSION.
Charter commissions elected pursuant to the provisions of Act No. 279, Pub. Acts 1909, as amended by Act No. 203, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5442 *et seq.*), are not legislative bodies, but are independent of and distinct from the common council, which is the sole legislative agency of the municipality.

3. SAME—EXPULSION OF MEMBER—APPOINTMENT.
The charter commission of the city of Detroit has no jurisdiction to expel a member of the commission duly appointed for the unexpired term of a member who has resigned. The writ of prohibition will issue to restrain an attempted exercise of power to expel.

4. PROHIBITION—OFFICE OF WRIT—PUBLIC OFFICERS—CHARTER COMMISSION.
Prohibition is the proper remedy to restrain the attempt of the Detroit charter commission to oust a member of the body from his office, after a hearing and determination that were void for want of jurisdiction.
OSTRANDER and KUHN, JJ., dissenting.

Petition by Henry J. Eikhoff against the charter commission of the city of Detroit for writ of prohibition to restrain respondent from proceeding to oust petitioner from his office as a member thereof. Submitted June 17, 1913. (Calendar No. 25,759.) Writ granted July 18, 1913.

Proctor K. Owens, for petitioner.

Richard I. Lawson, for respondents.

MCALVAY, J. Upon the application of petitioner a writ of prohibition issued against respondents, who were required to show cause to this court on its return day why said writ should be vacated, and said matter has been submitted to the court upon briefs and oral arguments. The respondent charter commission of the city of Detroit is a body authorized and created under and by virtue of the provisions of Act No. 279, Pub. Acts 1909, as amended by Act No. 203,

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Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5442 *et seq.*), and, as its name implies, it is a body created for the purpose of formulating and submitting a municipal charter to the qualified electors of the city of Detroit.

Under this legislation proceedings were taken and members of respondent charter commission were duly elected and qualified. Very soon afterward a vacancy occurred in said charter commission by the resignation of William T. Dust, one of its members. On June 2, 1913, following such resignation, petitioner Henry J. Eikhoff was, by virtue of the statute, duly elected by said charter commission to fill such vacancy, and immediately after such election he qualified as a charter commissioner by taking the oath of office as prescribed by law, and entered upon its duties. Afterward, without notice to petitioner, and without any charges being preferred against him for any cause or misconduct whatever, and without any hearing had, a resolution was introduced and taken under consideration by said charter commission proposing to vacate the seat of petitioner, to which he had been chosen and elected by said charter commission. Thereupon, pending action under said resolution to oust him as a member of said charter commission and summarily deprive him of all his rights therein, petitioner made application to this court for its writ of prohibition to restrain and enjoin such action. Pending the consideration of such application by this court, and before said writ issued, the said charter commission proceeded to and did pass such resolution declaring the seat of petitioner vacant, and ousting him from membership in said charter commission. The case has been considered by this court, and evidently also by counsel for the charter commission in its status as of the time of filing of the petition.

The answer and contention of the respondent charter commission to the order to show cause is based upon the grounds that said commission is a legislative

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body in its essential and component parts, with inherent power to pass upon the qualifications of its own members, and that its action in this regard is not reviewable, but final and conclusive; that the power to fill vacancies in its membership carries with it the power of removal.

Section 20 of Act No. 279, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 5442), as amended, provides as follows:

"The charter commission shall convene on the second Tuesday after the election, at the place designated therefor. The city clerk shall preside at the first meeting, shall administer the oath of office to the members-elect, and shall act as clerk of the commission. It shall be the sole judge of the qualifications, elections and returns of its own members, choose its own officers, except clerk, determine the rules of its proceedings and keep a journal. A roll call of its members on any question shall be entered on the journal at the request of one-fifth of its members, or less if it shall so determine. It may fill any vacancy in its membership, and it shall fix the time for the submission of the charter to the electors. No member shall receive compensation for more than 90 days and only for actual attendance. A majority of all the members shall constitute a quorum and its sessions shall be public."

The foregoing is the section upon which this respondent relies as conferring the powers and authority claimed by it in its contention that the action taken, looking towards ousting petitioner, was justified and legal.

Without giving any extended statement of the provisions of this legislation, it is proper to say that it was enacted for the purpose of providing a body which would formulate new charters for cities in this State, or amend charters already in existence, to be submitted to the electors for acceptance or rejection. The question of its constitutionality is not before the court. It contains other provisions from which may

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be determined the status of the charter commission as a body, the functions it may exercise, and the limitation of its powers and authority. Until recent years the incorporation of cities in this State has been accomplished by special legislation, or what have been known as "Local Acts." Without doubt one of the principal reasons for the legislation now under consideration was to harmonize municipal government in the different cities, and also apply the principle of local self-government, which has always been favored in this State. The creation of charter commissions was intended to facilitate the preparation of charters to be submitted to the consideration of the electors.

Provision is made by the machinery of this statute for the selection and election of members of said charter commissions. The power and duties of these commissioners are all fixed by this statute, and are confined to the limits of the municipality in which they are elected. They are therefore local officers elected for the sole purpose of framing and proposing charters to be submitted to the electors within such municipality for acceptance or rejection, at an election to be held upon a date to be fixed by the charter commission. The date on which the charter commission shall convene after its election and proceed to its duties is fixed by this statute, as is also the time when the charter to be framed shall be completed; this latter period being limited to 90 days after the commission convenes, as provided by sections 15 and 20, which must be construed together. The provision of section 15 is as follows:

"The charter commission shall convene within ten days after election and frame a charter for said city within ninety days thereafter"—while section 20 provides that: "The charter commission shall convene on the second Tuesday after election at the place designated therefor," etc., as already quoted.

This section fixes with absolute certainty the date

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when the commission shall convene, clearly showing the legislative intent to make no change as to the time within which the work of the commission is to be completed, by leaving the time unchanged and enacting the provision that "no member shall receive compensation for more than ninety days, and only for actual attendance."

We have stated all of the powers and authority specifically conferred upon charter commissions by this legislation. It is a well-established rule of statutory construction that where powers are specifically conferred they cannot be extended by inference, but that the inference is that it was intended that no other or greater power was given than that specified. It may be further said that the legislature recognized in this statute that the legislative body of each municipality is its aldermen or common council, which are specifically described as such in sections 18 and 19.

It is not contended on the part of this respondent that the charter commission of the city of Detroit was given express authority to oust any member from his office, but it is urged that, because of the following provisions quoted from section 20: "It shall be the sole judge of the qualifications, elections and returns of its own members," and "it may fill any vacancy in its membership"—the inference to be drawn is that it is a legislative body, with full authority to act, and it is compared with a State constitutional convention in that respect. We think that the matter of inference has already been disposed of, and that the only possible comparison between its powers and the powers of a constitutional convention lies in the words which make the charter commission "sole judge of the qualifications, elections and returns of its own members." The question as to whether a constitutional convention is a legislative body is not involved in the case.

This respondent is not a body created by the State

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Constitution, nor do we find that there is anything in the statute under consideration which makes it a legislative body, and the powers granted making it the sole judge of the qualifications and elections of its members and to fill vacancies do not *per se* make it such. Our attention has not been called to any legislative acts which it has been given power to perform, nor have we, from an examination of the entire act, found that it contains any such delegation of power. None of the acts permitted or required under this law by charter commissions can be construed or defined as legislative acts in the sense in which the word "legislative" is used when we speak of the three recognized branches of our republican form of government. The legislature by this statute created charter commissions as instruments, under its specific terms, to prepare charters for cities to be submitted to the electors, and to become the fundamental law of such municipalities only when accepted by a majority voting thereon. Our conclusion, therefore, is that we cannot agree with the main contention of respondent that these charter commissions are legislative bodies.

The next question to be considered is whether this statute confers upon charter commissions the power to oust one of their members. It is not contended that such power is specifically granted by this statute.

Whether or not members of these charter commissions are city officers within the meaning of that term as ordinarily understood and interpreted we need not determine. But we do conclude that, when elected, they constitute a legally authorized body distinct from and independent of the common council, which is made the sole legislative agency of the municipality.

In the instant case a vacancy was created by the resignation of a member, and petitioner was duly appointed by respondent charter commission to fill such vacancy. He accepted such appointment, and entered upon the duties of his office. The weight of the

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authorities holds that in such a case the appointment is made for the unexpired term. 23 Am. & Eng. Enc. Law (2d Ed.), p. 418, and cases cited; *Speed* v. *Detroit Common Council*, 97 Mich. 198 (56 N. W. 570); and *Speed* v. *Detroit Common Council*, 98 Mich. 360 (57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555).

Respondent charter commission has assumed the power and authority to remove petitioner and oust him from his office as a member of such commission, and has in fact actually passed a resolution to that effect. Such action was without authority of law, as was distinctly held in the cases of *Speed* v. *Detroit Common Council, supra.*

In view of our conclusions upon the principal question involved in this case, it will not be necessary to consider other questions discussed.

Respondent charter commission having failed to show cause why the writ of prohibition issued by this court should be vacated, and it appearing to the court that all the acts and doings of the said respondent taken in the premises to declare the seat of petitioner as a member of said commission vacant and ousting him from his office were without jurisdiction and void, said writ of prohibition is hereby declared and ordered to be and remain in full force and effect, without costs to either party.

STEERE, C. J., and MOORE, BROOKE, STONE, and BIRD, JJ., concurred with MCALVAY, J.

OSTRANDER, J. *(dissenting).* The writ, issued June 10, 1913, served June 11, 1913, prohibits and enjoins respondent from taking further proceedings against Henry J. Eikhoff relative to holding his office as member of the charter commission of the city of Detroit. His seat was declared vacated before the writ was served, perhaps before it was granted. The writ also prohibits interfering with the "free access of said petitioner * * * in and about the execution

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his duties as a member of said charter commission." It is alleged in the petition that a committee of the respondent body held a public meeting to discuss, and in which was discussed, the advisability of a charter provision for the nonpartisan election of office holders, citizens present taking part in the discussion. Petitioner appeared in this meeting "and discussed said question from the standpoint of a private citizen, and not as a member of the charter commission." He said, among other things, "I have heard several persons remark that the charter commission is a 'joke.'" This remark he says was incorrectly reported through the press and otherwise, and, as reported, incensed and enraged various other members of the commission, who at once conspired together to oust petitioner from his position as member of the commission. The public meeting mentioned was held on the evening of June 2d, and on June 3d a resolution was introduced by a member of the commission, during its sitting, that "the seat now occupied by Henry J. Eikhoff as a member of this body be, and the same is hereby, declared vacated." This resolution, under the rules of procedure, lay upon the table. It was adopted on the morning of June 10th. It seems that no charges were preferred against petitioner, and there was no trial or examination during which he was called upon, or had opportunity, to defend himself.

The answer of respondent says that, being a member of the charter commission, petitioner publicly stated, at the meeting referred to, that the charter commission was a joke, with the purpose of bringing public ridicule and disgrace upon the commission, to belittle and humiliate the commission and the members thereof. It is further stated in the answer, and is not traversed, that conceiving [illegible] remedy by injunction against [illegible] said resolution [illegible] court for [illegible] therein that—

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"Some of the members of said commission, realizing that your orator could not be influenced to vote on any and all amendments to said charter which they desired, and realizing that in all probabilities he would be the means of obstructing some of the arbitrary amendments to the charter of the city of Detroit which would be detrimental to the citizens and favorable to the favored few, they were threatening to start and did start proceedings to hinder and interfere with your orator in the performance and execution of his duties as a member of the charter commission, and threatened to oust him out of his office as a member of the charter commission of the city of Detroit, and threatening to declare the office vacant in which your orator had been elected and duly qualified, and unless restrained by injunction * * * will * * * vacate said office, to the damage of your orator in the sum of upwards of $100," also working injury to his reputation.

These public charges, the answer sets out, were made before the passage of the resolution ousting the petitioner. It is broadly averred by respondent that petitioner's remarks in the public committee meeting were correctly reported, and that it was after investigation that the action ousting petitioner was taken.

The writ of prohibition is preventive rather than remedial process, and the history of its use discloses few, if any, instances in which it has been employed to control or prevent action not judicial in character. Mr. Stevens, in his work on Michigan Practice [v. 2, § 475], says that:

"The Michigan statute upon the subject seems to contemplate that the writ is applicable to judicial proceedings only; and there is no reported case in Michigan where the writ has been granted to stay other than judicial proceedings."

His work was published in the year 1900, and the footnotes do not refer to *Speed* v. *Detroit Common Council*, 98 Mich. 360 (57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555), decided in 1894. In that case,

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the writ was issued to prevent the common council of Detroit from investigating charges preferred by the mayor of the city against the city counselor, whom he asked the council to remove from office. In sustaining the right to employ the writ, this court said:

"Under the Constitution, the legislature may provide for the removal of municipal officers. It certainly has never been regarded in this State that the officer or body upon whom this power is conferred acts in a purely political, administrative, or legislative capacity. Such officer or body acts, and must of necessity act, in a quasi judicial capacity, and the method of procedure must be of a quasi judicial character. *Stockwell* v. *Township Board,* 22 Mich. 341; *Dullam* v. *Willson,* 53 Mich. 392 [19 N. W. 112, 51 Am. Rep. 128]; *Clay* v. *Stuart,* 74 Mich. 411 [41 N. W. 1091, 16 Am. St. Rep. 644]; *Fuller* v. *Attorney General,* 98 Mich. 96 [57 N. W. 33]. Such officer or body then becomes an inferior tribunal, amenable to the writ of prohibition when acting in excess of the jurisdiction conferred. In such cases it is of little consequence what name is given to the power conferred. The name cannot relieve it of its essential character. It would be a reproach to the law if it did not provide a speedy remedy by which such tribunals can be prohibited from the exercise of an excess of authority, or of an authority which they do not possess. We are of the opinion that the writ lies in the present case. *State* v. *Common Council* [53 Minn. 238], 55 N. W. 118 [39 Am. St. Rep. 595]; *People* v. *Cooper,* 57 How. Prac. [N. Y.] 463; 1 Dill. Mun. Corp. § 191 (4th Ed. § 253)."

It appears therefore that in that case the writ was issued to prevent threatened action which, if taken, would have been quasi judicial in character; the power to take the action being denied. Action of respondent vacating the seat of petitioner cannot be prevented. The writ has not performed, and cannot perform, any proper office, and therefore it ought to be vacated. The prohibition, in form a continuing one, against interference with petitioner in the perform-

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ance of his duties as member of the commission is dependent upon, and an elaboration of, the prohibition against taking action to unseat him. To compel the commission to recognize as a member one whom it has already unseated is in effect to set aside the judgment of the commission by a writ of prohibition. The writ should be vacated.

KUHN, J., concurred with OSTRANDER, J.

SNYDER *v.* BERRIEN CIRCUIT JUDGE.

CONTINUANCE—WITNESSES—MANDAMUS—AFFIDAVITS.

An affidavit for continuance, on the ground that a material witness is absent from the jurisdiction, is not met by a counter-affidavit in opposition thereto showing that the alleged absent witness is the husband of plaintiff, who does not consent to his giving testimony against her; since the husband's testimony may be competent within the exceptions of 3 Comp. Laws, § 10213 (5 How. Stat. [2d Ed.] § 12857).

Mandamus by Margaret Snyder against George W. Bridgman, Berrien circuit judge, to compel respondent to vacate an order granting a continuance in a cause in which petitioner was plaintiff and one William F. Stine defendant. Submitted June 10, 1913. (Calendar No. 25,743.) Writ denied July 18, 1913.

O'Hara & O'Hara, for relator.

Gore & Harvey, for respondent.

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MOORE, J. We quote from the brief for the relator:

"This is an application for a mandamus to compel the respondent to set aside an order made by him on May 19, 1913, continuing a cause pending in his circuit, in which relator was plaintiff and one William F. Stine was defendant, over the April term unto the September term, 1913, of the circuit court for the county of Berrien, and to reinstate said cause on the docket for trial at the present (April) term of said court."

The case had been set for trial. We again quote:

"On May 16, 1913, defendant's attorneys filed an affidavit and motion for a continuance over the April term, on the sole ground that an alleged witness named William Snyder was out on the Pacific coast, and that he was a necessary and material witness, without whom defendant could not safely proceed to trial, etc., and that he expected to have said Snyder or his deposition at the next term of said court."

The application was for a first continuance, and was contested. We again quote:

"On May 17, 1913, relator made an affidavit, which affidavit was filed in said circuit court on May 19, 1913. In this affidavit she sets up that the alleged witness William Snyder is her lawful husband, they being married some 13 years, and that about April 15, 1913, her husband went to the Pacific coast to locate, and that it was the intention of relator and her husband for her to move the family out to the coast and permanently reside there as soon as the husband was located there. That her husband would not be a witness for defendant, and under the laws of this State could not if he would, without her consent, and she alleged in said affidavit that she would not consent. * * * Plaintiff thereupon applied to this court for a writ of mandamus to compel the said circuit judge to vacate his order continuing the cause over to the September term of said circuit court, and to reinstate said cause upon the docket for the present term of said circuit court for trial."

A reference to the affidavits shows that the one filed

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by defendant made a *prima facie* case for continuance. The affidavit filed on the part of the relator sets up the fact of the marital relation existing between the witness Snyder and the affiant, and closes as follows:

"Affiant further says she is advised by James O'Hara, one of her counsel herein, that under the laws of this State a husband cannot be examined as a witness against his wife without her consent, and while she knows that her said husband would not and could not testify to anything against her right to recover in this action, she hereby notifies the court, counsel, and other party to this suit that she does not consent to his testifying at all."

It does not appear in this affidavit upon what subject the witness will testify, nor is such a statement of facts shown as to take the case out of section 10213, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12857), as construed by this court in *Hunt* v. *Eaton*, 55 Mich. 362 (21 N. W. 429). The case of *Geddis* v. *Wayne Circuit Judge*, 151 Mich. 122 (114 N. W. 874), if not controlling, is at least suggestive.

The writ is denied, with costs.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

BLOOMFIELD *v.* MALONEY.

1. CONTRACTS—OFFER AND ACCEPTANCE—REWARDS.

An advertisement offering a reward of $1,000 "for the arrest and conviction" of a criminal, is to be construed not literally but substantially, so that persons who give in-

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formation leading to the arrest of the offender and resulting in his conviction by a court of competent jurisdiction are entitled to the fund.[1]

2. SAME.

Where one of the defendants, in an interpleader suit for the purpose of securing a reward offered, informed the officers that she knew the name of the offender, and gave such information that the officer, with the aid of facts furnished by two other defendants, succeeded in identifying him and caused his arrest, whereupon he pleaded guilty, the defendants were entitled to have the reward divided among them in the proportions justified by the value of their services: one-half to the first informant, the other half to be equally divided between the other defendants.

Appeal from Jackson; Parkinson, J. Submitted June 11, 1913. (Docket No. 74.) Decided July 18, 1913.

Bill by Charles C. Bloomfield against W. Frank Maloney, Clara McKain, and Edward Kurtz for a decree of interpleader. From a decree awarding the fund to defendants Kurtz and Maloney, said McKain appeals. Reversed.

Wilson & Cobb, for complainant.

Fellows & Chandler, for defendant and appellant.

Price & Whiting, for defendants and appellees.

STONE, J. This is a bill of interpleader. The complainant, on or about January 14, 1910, received a letter purporting to have been written by a member of a "Black Hand" society of Chicago, Ill., stating that if complainant did not leave a large sum of money at a place therein named in the city of Jackson, on the night of the 20th day of January, 1910, he would be killed. In order to apprehend the writer of the letter, or effect the capture of the person calling for

[1] On the question what must be done in order to earn reward for arrest, see note in 7 L. R. A. (N. S.) 216.

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the package of money, complainant placed a decoy package at the place designated, and had it watched by officers. During the evening some person, then unknown to complainant, came and took possession of the package and made his escape. On January 21, 1910, complainant caused a reward of $1,000 to be offered for the arrest and conviction of the writer of such threatening letter. On the same day one Ray Horsman was arrested and charged with the crime of sending such threatening letter to complainant, and on February 4, 1910, said Horsman pleaded guilty in the circuit court to an information charging him with said offense, and was sentenced to a term of imprisonment. Thereafter the defendants Maloney and Kurtz claimed that they furnished information that led to the arrest and conviction of Horsman, and that they were each entitled to one-half of said reward, to recover which they commenced an action at law against complainant in the circuit court. A like claim was made by defendant Clara McKain for all such reward, and a like action was by her commenced. Complainant represented by his bill that he had always been willing to pay the amount of such reward to such person or persons as should be lawfully entitled to the same, and he offered to bring the money into court. The bill complied with the practice by proper averments, and prayed that defendants interplead and settle and adjust their said demands between themselves. The money was paid into court, and the suits at law were restrained.

The answers of the several defendants admitted the offering of the reward as alleged in the bill, and each claimed the fund. A decree was duly entered, to the effect that the bill of interpleader was properly filed, and that the several answers should be taken as and for an interpleader between defendants, and as statements of their respective claims. Upon the final hearing the entire reward was decreed to the

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two defendants Maloney and Kurtz, with costs against the defendant Clara McKain, and she has appealed.

Upon the hearing it appeared that the police made an unsuccessful attempt to arrest the person who tried to get the package, about 10 o'clock on the evening of January 20th, but he got away, and ran up the street; the officers shooting at him. He ran into an alley in the rear of the Athenaeum theater and escaped. Defendant Maloney and the son of defendant McKain attended a show at the Athenaeum on the evening in question, and sat together. Maloney had gone down on the street between acts, and while there the man pursued by the officers passed him, and Maloney testified that he recognized the man as Ray Horsman. Upon his return to the gallery he had talked the matter over with Mrs. McKain's son, and had related what he saw. Maloney testified as follows:

"When I returned I said to him, 'You ought to have been down there and seen the fun;' he says, 'What's the matter?' I says, 'I don't know.' I says, 'There are two or three fellows after young Horsman;' he says, 'What Horsman?' I says, 'Young Ray Horsman.' Neither of us could figure it out what it was. I told him what I saw, but we couldn't tell what was the matter."

Upon that point Mrs. McKain's son testified:

"When they came up Maloney sat next to me and said there was something doing downstairs; said he saw a couple of men chasing some one else and they ran by him, and as they went by he got a glimpse of them, and the one pursued he said was 'a dead ringer' for Ray Horsman."

Neither Maloney nor young McKain at this time knew anything of the "Black Hand" letter. The whole matter appeared in the next morning's newspaper, with a description of the attempted capture, the escape, and the offer of reward. Mrs. McKain saw this offer of reward about half past 6 on the

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morning of January 21st. Her attention was called to it by her son. He testified:

"I got up a little after 6 and got the paper off the porch; mother was getting breakfast, and that of course was the first thing I read; big scare lines on the first page of the Jackson Patriot; I read that, the gist of it. The first thing I saw was about the reward; it was in the head lines, $1,000 reward. I said, 'I bet I can name the party.' Read the description; it fitted Horsman to a T. I said I think I knew who it was, and mother said, 'Do you?' 'I will call up Strobel and get the reward.' I said 'No, you better not, better keep out of it; I don't want to mix up in the affair and get up in court, one thing and another.' She called Strobel up and talked with him as I was leaving the house, and I think she said he was coming up there to get all the information she had."

Upon this subject Mrs. McKain testified as follows:

"I saw the morning Patriot at 6:30 in the morning of January 21st; my son read it to me, and later I saw it. He read it aloud; after he had read it he told me what he had heard at the Athenaeum the night before; what Mr. Maloney told him; said Mr. Maloney told him it was a 'dead ringer' for Ray Horsman; after this article had been read, and after this talk with my son, I called up Chief Strobel; my son had in his talk told me of Mr. Maloney being downstairs and seeing this man, and that he was most positive that it was Ray Horsman. I asked Chief Strobel if since the paper had gone to press he had found the 'Black Hand' man, and he said that he hadn't; that he hadn't any clue; I told him I could tell him who it was, and I did tell him; I told him it was Ray Horsman. He kind of doubted it. * * * He says, 'I will come over to your house,' and he dropped the phone at that and did come over. * * * He says, 'If you can tell me, Mrs. McKain, you can get $1,000; I will give you $1,000.' I supposed he had the handling of the $1,000. I called him up simply to get the reward. * * * I think he came there about a quarter after 7. * * * While Mr. Strobel was there I called up my son at his request; he wanted to know if he was at the foot of the stairs, or if he was in the gallery;

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I called him up to find out; after I had talked with Mr. Strobel, he said, 'You have convinced me.' "

She further testified that when Mr. Strobel was leaving, she might have told him to go and see Frank Maloney.

Upon this subject Mr. Strobel, chief of police, testified as follows:

"The morning of January 21st I received a telephone call from Mrs. McKain. I should judge somewhere between 6 and 7 o'clock, and we talked. * * * She told me then, or down at the house, I had better look up Ray Horsman, or words to that effect. * * * I went to Mrs. McKain's house on Mason street, and had a talk with her there, and she related to me what her son Earl had told her about the affair; said Earl, as I remember it, was at the Athenaeum that night. She called him up; he had gone to work; she called him up and talked with him, and I asked Mrs. McKain whether Earl was sure it was Ray Horsman; she said, 'Why, yes,' she thought so. She says: 'Go and see Frank Maloney; he knows all about it.' I was not acquainted with Mr. Maloney; had seen him, but had no acquaintance; had been in his father's store; I knew where he was located."

The witness further testified: That the information which he received from Mrs. McKain was the first information received connecting Horsman with the black hand transactions; that she suggested that he see W. Frank Maloney, defendant. Pursuant to that suggestion witness went to Maloney's store. When he got to the store he found defendant Maloney, his father, and defendant Kurtz. The two defendants Maloney and Kurtz were sitting together. That witness said to Frank Maloney,

"I understand you were out back of the Athenaeum last night when a couple of my officers were chasing a man."

Witness told Maloney that he wanted to know what he saw there, and the latter went on and told witness that he was outside, standing on the walk on Wash-

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ington street, somewhere near the stage entrance, near the end, and said he heard some shots fired, and pretty soon there was a man turned the corner by the post office and cut diagonally across the rear end of the Athenaeum, where he was standing, and ran around in the rear of the theater. Maloney said that just then there were several officers chasing the party around the corner of the post office.

"Maloney turned to Mr. Kurtz, and says: 'I have told my story; you tell your story.' "

That defendant Kurtz went on and told witness that along about 10 o'clock a fellow came into the drug store where he worked and said: "Hide me, hide me." That Kurtz asked the party what was the matter, and he replied, "Never mind, show me a place to hide." That Kurtz told him to go into the back room, which he did, and a short time thereafter came out and wanted to borrow Kurtz' overcoat, which he loaned him, and about an hour or so afterwards he brought the overcoat back. Witness testified that he then asked, "Who is that man," and Kurtz said, "Ray Horsman." It was the witness' recollection that Kurtz first gave the name, but that both Kurtz and Maloney gave the name at the same time, and both agreed that the party was Ray Horsman. Soon after this interview with Maloney and Kurtz, witness arrested Horsman, and his confession and conviction followed. The witness further testified, in answer to a question, as follows:

"*Q.* When you did come from Maloney's store to the dry goods store where Horsman was employed and made his arrest, you were relying upon the information obtained from Maloney and Kurtz? That is true, isn't it?

"*A.* Yes; of course they were talking from what they personally saw—the other was hearsay; I don't know as I stopped—I took all the information I had. I probably didn't stop to think of that. I wouldn't be

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justified in arresting a man on hearsay, I don't suppose. * * * They told me their story mostly without asking a question, and there was no hesitancy when I asked who it was. When I went there I was keen on the scent, and anxious to find out just what the facts were; I lost no time in telling my errand there and asking what they knew, and as they were telling it along I asked such questions as I saw fit. * * *

"*Q.* I suppose by the time he got that far with his story you had become so convinced you had the right man you didn't wait to get the details of what he said about the black hand letters; you thought you would get that later; you were anxious to get away and arrest Horsman?

"*A.* Certainly; I didn't expect to spend any more time than I had to."

The defendant Kurtz testified, in substance: That he had known Ray Horsman for some years, simply knew him to speak to him as he came into the store where witness worked; that about 10 o'clock of the evening of January 20th, while witness was in the front part of the store, and while it was raining, Horsman came running down the alley, and came running in the front door and said: "Ed., for God's sake hide me." Witness said, "What for?" "He said, 'Hide me.'" "I says, 'Go into the back room.'" He did go into the back room and stayed there about five minutes. Finally he came out and asked to borrow witness' overcoat, and promised to bring it back before the store closed, after the play. He borrowed the coat, and as he was going out witness said: "Ray, what does this mean, what is the excitement?" He said, "I can't tell you about it," and went out the front door. After the play was over Horsman brought the coat back and sat down at the soda counter and had a glass of ginger ale. Witness then said to him: "Ray, what does this mean, what is the occasion of your running in this way?"

He said:

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"I will tell you. About two weeks ago I received a letter from Chicago telling me I should go to this place, * * * and get this package on Thursday night, January 20th, and on Friday night take it out on the corner of E. Main and Gorham street and throw it in between two stores."

Witness said, "Ray, I think it is a joke." Horsman said,

"Well, no, I don't, because I got another letter Tuesday telling me not to forget Thursday night, January 20th, at 10 o'clock."

Witness said,

"I think it is a joke all the way through, somebody has been putting over something on you."

He said:

"I don't know. Don't say anything about it, will you, to any one?"

Witness asked Horsman if he got the package, and he said, "Yes, but during the shooting it scared me so I dropped the package," and he stated that he had been shot at. The witness further testified that after Horsman had gone out of the store defendant Frank Maloney came in, and that he and witness talked about the matter, neither of them at that time knowing anything about the black hand letter, except what may have been told Kurtz by Horsman. The witness told Maloney that "the fellow came in here." Maloney asked, "Who was it?" Witness said, "Ray Horsman." That the next morning Maloney called the witness on the telephone as witness was dressing, and after witness was dressed he went down to Maloney's store, and Maloney asked him, "Did you know about the shooting?" And the witness replied, "Yes, what I know about last night;" and Maloney said, "Look at the paper." That while glancing over the headlines of the paper Chief Strobel came in, and a little afterwards Lieutenant Hudson. That just

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before Strobel came in Maloney said to the witness, "We better go over to the station."

Defendant Maloney corroborated defendant Kurtz in his testimony, and, after testifying that he saw the paper on the morning of the 21st, and after he got down to the store he called up defendant Kurtz about 8:15 or 8:20 a. m., and that soon Mr. Kurtz came in, that Maloney showed him the paper and they were reading it over, and that it was their intention to go directly down to the station, to police headquarters, and tell what they knew about it, and that just about that time Chief Strobel and Lieutenant Hudson came in.

We have given somewhat in detail the evidence here to show the circumstances surrounding the transaction, as stated by the several witnesses.

It is the claim of the appellant that, she, having communicated the first information to the officer, is entitled to the whole of the reward, and that the money should be paid to the person who first communicated the information that ultimately led to the arrest and conviction; that it is not necessary, in order to entitle her to recover the entire reward, that she possessed or communicated facts sufficient to warrant an arrest and conviction, but that the meritorious question is: Who communicated the information that started the inquiry which led to the result obtained? On the other hand, it is the claim of the appellees that the mere communication of suspicions as to the guilt of a person whose arrest and conviction are secured by other evidence is not compliance with the terms of the offer.

Under the pleadings, we have treated this case as one where the reward was offered for the arrest and conviction of the offender. It is the claim of appellees that the service contemplated, by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining and giving

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to some proper person interested sufficient information in relation to the perpetrator of the crime as to authorize and secure the arrest of the offender, and subsequently to secure his conviction by a court of competent jurisdiction. And, as the communication of appellant to the officer was merely the communication of suspicions which of themselves did not induce the officer to make the arrest, that appellant is not entitled to any portion of the reward; that a reward for an arrest is not rendered by information which has to be supplemented by investigation by others.

We have examined many of the reported cases upon this subject, as well as text-books, and find it difficult to reconcile all of the authorities. A leading case upon the subject is that of *Haskell* v. *Davidson*, 91 Me. 488 (40 Atl. 330, 42 L. R. A. 155, 64 Am. St. Rep. 254). In that case the defendant was one of 30 citizens who agreed to pay a certain sum each as the reward for the arrest and conviction of a person, or persons, who had entered the room of one Wilson and stolen money therefrom. The plaintiffs were informed of this offer, and were thereby induced to enter upon an investigation of the crime referred to, as a result of which facts and circumstances were discovered by them tending strongly to inculpate one Thompson, who, upon being confronted with the charge by plaintiffs, made a full confession of his guilt, and subsequently pleaded guilty to the indictment found against him. The court there said:

"An offer of reward is a proposal. The party making it may insert his own terms, and no person can become entitled to the reward without a performance of all the terms contained in the proposal. But such performance need not be a literal compliance with the terms of the offer. It is sufficient, if the party claiming the reward has substantially performed the service required by the proposal.

"An offer of a reward for 'the arrest and convic-

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tion' of an offender cannot be taken literally. The person who by reason of the offer is induced to make an investigation and finally obtains possession of sufficient facts to authorize the arrest of an offender and his subsequent conviction for the crime referred to in the offer, certainly cannot himself convict the offender. The service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be, the obtaining and giving to some proper person interested, sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction.

"In *Crawshaw* v. *Roxbury*, 7 Gray [Mass.], 374, the offer was 'for the apprehension and conviction.' The court at *nisi prius* instructed the jury, in regard to the service to be performed to entitle the plaintiff to a reward, that the offer of a reward could not be taken literally, for, as the conviction must be in due course of law, requiring the intervention of the court and jury, a person might be entitled to the reward by becoming the prosecutor, and, as such, causing the arrest and conducting the case to a conviction; or he might be entitled to it by giving information which would lead to and produce the arrest and conviction of the offender. The instruction was unqualifiedly sustained by the full court. See, also, to the same effect, *Besse* v. *Dyer*, 9 Allen [Mass.], 151 [85 Am. Dec. 747]."

See, also, *Shuey* v. *United States*, 92 U. S. 73. This was a case where the offer of reward was for the apprehension of John H. Surratt, one of Booth's accomplices.

It appears to us that the reward should be paid to the person who was, or persons who were, the original and meritorious cause of the arrest and conviction of the offender; that is, the person or persons who first communicated the information that ultimately led to both. *Fitch* v. *Snedaker*, 38 N. Y. 248 (97 Am. Dec. 791); *Burke* v. *Wells Fargo Co.*, 50 Cal. 218; 24 Am. & Eng. Enc. Law (2d Ed.), p. 956,

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and cases cited; 34 Cyc. p. 1746 *et seq.; Kinn* v. *First Nat. Bank*, 118 Wis. 537 (95 N. W. 969, 99 Am. St. Rep. 1012). Some of the authorities make the test depend upon the inducing, or the proximate, cause of the arrest, and turn upon the question whether sufficient information to authorize arrest and subsequent conviction was given, claiming that the facts disclosed must be such as induced the officer to make the arrest.

Bearing in mind that the reward offered here was for the arrest and conviction of the guilty party, there is some difficulty in determining just what was the moving cause of the act of arrest. Of course the confession having followed the arrest, we are not concerned about the conviction. We gather from the testimony of the officer that he would not have made the arrest solely upon the statement of Mrs. McKain, yet he testifies, referring to his talk with Maloney and Kurtz, as follows:

"When I went there I was keen on the scent, and anxious to find out as quick as I could just what the facts were. I lost no time in telling my errand there and asking what they knew."

A careful consideration of the entire record has led us to the conclusion that all three of the defendants may be said to have contributed to the arrest and conviction of Horsman, and that this is a case for the apportionment of the reward. There was concert of action. Manifestly, it was the early statement made by defendant McKain which set the officer at work and led to so speedy a result. It cannot be said that in a sense Mrs. McKain was not the moving cause. We have no doubt, from the testimony, that she referred the officer to Maloney as the true source of information which would justify the result. We cannot speculate and say, as matter of law or fact, that the officer would have obtained this information from Maloney and Kurtz without the intervention of Mrs. McKain. There might have been much delay in

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reaching results had not Mrs. McKain given the first information and reference to the source of evidence which led the officer to act. In our judgment, there was such concert of action here as brings this case within the rule of apportionment, under the authorities. Practically, in this case, it appears that it was the information furnished by all of the defendants which led to the result—not a repetition of the same information, but information of independent facts. It was Mrs. McKain who alone referred the officer to defendant Maloney, and he in turn referred to Kurtz as corroborating his statement of the facts which were deemed sufficient to warrant the arrest. It was said by an able English judge that the reward should be divided among such persons as gave information and assistance in proportion to the value of their services. Here each one performed a part in the entire transaction. *Fargo* v. *Arthur*, 43 How. Prac. (N. Y.) 193; *Goldsborough, Adm'r*, v. *Cradie*, 28 Md. 477; *Elkhorn Valley Lodge* v. *Hudson*, 59 Neb. 672 (81 N. W. 859); 24 Am. & Eng. Enc. Law (2d Ed.), p. 959, and cases cited; 34 Cyc. p. 1750.

There seems to be no arbitrary rule for the division of the reward under circumstances like the present. The distribution should be equitable. We deem it equitable and just in this case, and shall so direct that one-half of the reward, now deposited in the court, shall be paid to the appellant, Mrs. McKain, and the remaining one-half to the defendants Kurtz and Maloney. No costs in the court below will be taxed against appellant, and she will be given her costs of this court to be taxed against appellees, and the decree below will be reversed, and one entered here in accordance with this opinion.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

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G. F. SANBORN CO. *v.* RICHTER.

TAXATION—REDEMPTION—NOTICE—CHAIN OF TITLE.

In order to cut off the right of redemption from a tax sale, the holder of the tax title must serve notice on all persons entitled thereto. The grantee under the last recorded deed in the regular chain of title is one of the parties entitled to notice and the provision is not met by service on a later grantee in certain tax deeds issued by the State.

Appeal from Ontonagon; Cooper, J. Submitted June 11, 1913. (Docket No. 71.) Decided July 18, 1913.

Bill by G. F. Sanborn Company against Theodore Richter and another for redemption from certain tax purchases. From a decree for complainant, defendants appeal. Affirmed.

John Jones, for appellants.

Stone & Wieder, for appellee.

Complainant is the owner through mesne conveyances of tax titles for the years 1891-1898, inclusive, covering the S. W. ¼, section 19, township 49 north, of range 41 west, in the county of Ontonagon. Defendants are owners by purchase from Henry A. Gunderson of tax titles covering the same description for the years 1899-1901, inclusive. For these titles Gunderson paid the State the sum of $129.58. On July 16, 1908, complainant caused to be paid to the register in chancery for Ontonagon county the sum of $266.46; that being the amount necessary to redeem from the Gunderson titles under section 141 of

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the general tax law of the State (Act No. 236, Pub. Acts 1903). Defendants were duly notified of this deposit by the register, and a quitclaim deed was demanded.

The regular chain of title shows that the land in question was patented to Jacob Schwartz June 15, 1852, by him deeded to the American Mining Company August 13, 1852, and by said company deeded to the Derby Mining Company March 16, 1855. The last-named company is the grantee in the last-recorded deed in the regular chain of title. It is a Michigan corporation, whose office for the transaction of business in this State was, by its articles of association, located in the county of Ontonagon.

Defendants having refused to reconvey, the bill in this cause was filed. It is the contention of defendants that Gunderson, their grantor, served a valid notice to redeem from his tax title purchases upon all persons required by the statute. The proof of service follows:

"Proof of Service by Registered Mail:

"State of Michigan, County of Ontonagon—*ss.*:

"I do hereby certify and return, that on the 26th day of September, A. D. 1904, I served a copy of the foregoing notice on Cazenovia Land Company, Milwaukee, Wis., who are the grantees under the last recorded deed issued by the auditor general upon the within described land by depositing in the post office at the village of Ontonagon in said county for transmission through the United States mail one registered letter same containing a true copy of said notice properly addressed to said above named persons as follows: Cazenovia Land Co., Milwaukee, Wis., receipt for which said registered letter is hereto annexed and forms a part of this return.

"WILLIAM MCFARLANE, Sheriff of said County.

"My fees, $1.20. Dated October 17, 1904.

"Proof of Failure of Service, Personal and Mail:

"State of Michigan, County of Ontonagon—*ss.*:

"I do hereby certify and return that after careful inquiry I am unable to ascertain the whereabouts or

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post office address of American Mining Company ——— in the regular chain of title to the foregoing described land——— grantee named in the last recorded deed or ——— or ——— or of the heir ——— of said grantee, or the whereabouts or the post office address of the executor, administrator, trustee, or guardian of such grantee, mortgagee or assignee upon the foregoing described land.

"WILLIAM MCFARLANE, Sheriff of said County.

"My fees, $1.10. Dated October 17, 1904."

From a decree in favor of complainant, defendants appeal.

BROOKE, J. *(after stating the facts).* The only question involved in this cause is whether it was necessary for defendant's grantor, Gunderson, to make service of the notice upon the Derby Mining Company; that company being the grantee in the last-recorded deed in the regular chain of title. It seems to be the contention of defendants that service upon the Derby Mining Company was not necessary because the title of that company had been completely cut off by a series of sales to the Cazenovia Land Company, through which company complainant derives title. It is likewise contended that a fair analysis of the term "regular chain of title" shows it to mean "the original title passed on through a series of legal, regular steps, following each other in natural sequence; that the purchase of a tax title under the law as it was prior to Act 229 of 1897, if valid, so that the deed when received conveyed the fee title to the land, is just as much a step or deed in the regular chain of title as any other conveyance can be, whether voluntary or involuntary." In our opinion neither of these contentions is tenable.

The first presupposes the regularity and legality of the tax sales to the Cazenovia Land Company, and that under the law as it then stood the Derby Mining Company was precluded from contesting their

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validity. The second position is foreclosed against defendant's contention by the case of *Griffin* v. *Jackson*, 145 Mich. 23 (108 N. W. 438, 9 Am. & Eng. Ann. Cas. 74), where this court, speaking through Justice HOOKER, said:

"We are of the opinion that by 'regular chain of title' was meant the chain of title based upon the patent."

The statute (section 140 of the general tax law) provides for service of the notice upon "the grantee or grantees under the last recorded deed in the regular chain of title to said land, and upon the grantee or grantees under the last recorded tax deed issued by the auditor general," etc. This language is so plain as to render construction unnecessary. Defendant's grantor, Gunderson, evidently understood the statute requirements, for he made an attempt to serve the notice upon the American Mining Company, the grantor of the Derby Mining Company, apparently being under the impression that the American Mining Company was the grantee in the last-recorded deed in the regular chain of title.

Until the statutory notice is served upon all parties entitled thereto and proof thereof is made and filed, the right of redemption remains to all. *Hansen* v. *Hall*, 167 Mich. 7 (132 N. W. 657), and cases there cited.

The decree is affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, KUHN, OSTRANDER, and BIRD, JJ., concurred. STONE, J., did not sit.

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KINGSTON *v.* BUSCH.

1. DEEDS—RESTRICTIVE CONDITIONS—COVENANTS—BUILDING RESTRICTIONS.

   Under restrictions contained in a deed prohibiting the erection of a saloon or store, or of any dwelling house of less value than $2,000, upon the premises conveyed, a duplex or two-family residence could not be constructed on the lot.

2. WORDS AND PHRASES—DEFINITION—DWELLING HOUSE.

   A dwelling house means a building designed as a single dwelling to be used by one family.

Appeal from Wayne; Mandell, J. Submitted June 19, 1913. (Docket No. 22.) Decided July 18, 1913.

Bill by Samuel R. Kingston and others against Charles A. Busch and another for an injunction. From a decree for complainants, defendants appeal. Affirmed.

N. Calvin Bigelow, for complainants.

Walter Barlow, for defendants.

BROOKE, J. The bill of complaint in this cause is filed to enjoin defendants from erecting upon a certain lot "any building other than a single dwelling house intended for the occupancy of one family."

The restriction in the deeds running to complainants is as follows:

"That said premises shall be used for residence purposes only; that no dwelling house shall be erected thereon at a cost of less than $2,000; and that no building or part of building shall be erected on said premises within 15 feet from the front or Josephine avenue line of said premises."

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The restriction contained in the deed to defendants is as follows:

"This deed is made upon the express condition that if the said second party, his heirs, or assigns erect or suffer to be erected any saloon or store, or erect or suffer to be erected any dwelling house of a value of less than $2,000, or less than 15 feet from the street line upon the premises hereby conveyed within 99 years from the date hereof, then in that case the title of the premises hereby conveyed shall revert to the said first parties, and the said first parties may re-enter upon said premises and remove said second party, his heirs, or assigns."

Defendants proposed to erect a "duplex" or two-family residence. After a full hearing in open court the learned circuit judge who heard the case filed the following opinion:

"I am of the opinion that this case is ruled by *Harris* v. *Roraback*, 137 Mich. 292 [100 N. W. 391, 109 Am. St. Rep. 681], wherein, construing the language used in accordance with the evident intention of the parties, it was held that one dwelling house on each lot meant a building planned and designed as a single dwelling, to be used by one family, and also by *Bagnall* v. *Young*, 151 Mich. 69 [114 N. W. 674], wherein it was held that the restriction in the deed against building anything on the premises except a two-story dwelling house prevented the grantee from erecting a two-story double dwelling house to be occupied by two families.

"The cases of *Tillotson* v. *Gregory*, 151 Mich. 128 [114 N. W. 1025], *James* v. *Irvine* [141 Mich. 376, 104 N. W. 631], and *Harris* v. *Roraback*, 137 Mich. 292 [100 N. W. 391, 109 Am. St. Rep. 681], relied upon by the defendants, recognize these principles, but injunctions were denied in both cases because no general plan had been observed in the respective neighborhoods, and certain violations of the restrictions had been permitted by lot owners and complainant, which indicated binding constructions put by them upon the restrictions different from those sought in the court proceedings.

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"In the case at bar all buildings erected in the subdivision have conformed strictly with the restrictions construed as urged herein by the complainants. In my opinion the language used in the deed of defendants' grantor construed in accordance with the first-cited cases means that no building shall be erected except a single dwelling house. It follows that as the building defendants proposed to erect does not conform with this construction its erection should be enjoined. A decree will be entered for the complainants, perpetually restraining the defendants from prosecuting the work undertaken."

In the subdivision in question there are 70 lots. These lots so far as built upon have been subjected to one or other of the restrictive clauses, *supra*. But 21 lots and two parts of lots have been sold subject to the restrictive clauses. The balance is still in the hands of two owners, who themselves imposed the restrictions upon those to whom they sold. We are of opinion that a general plan of improvement is clearly indicated, and that there has been no departure from that plan. The plan was to have one residence for one family only upon each lot.

The contention that the words "any dwelling house" should receive a different construction in this connection from the words "a dwelling house" is not tenable. This case is ruled by *Schadt* v. *Brill*, 173 Mich. 647 (139 N. W. 878).

The decree is affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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GALVIN v. DETROIT STEERING WHEEL & WINDSHIELD CO.

1. MASTER AND SERVANT—CORPORATIONS—CONTRACTS—SALARY—PAROL EVIDENCE—ORAL AGREEMENT—FRAUDS, STATUTE OF.
   Where several incorporators entered into a written contract providing that plaintiff should have charge of and manage the foundry of a corporation which was not yet organized, and it was not determined what his salary or term of employment should be, in an action for wrongful discharge plaintiff was entitled to introduce testimony to show a subsequent oral agreement of the corporation to pay him $1,500 a year, and that the term of employment should be a year: nor was the contract void under the statute of frauds, performance being possible within a year.[1]

2. CORPORATIONS—MANAGER—PRESIDENT—PRINCIPAL AND AGENT.
   Evidence that the president of a corporation took charge of and conducted its business, made contracts and performed the duties of general manager, that all the officers and directors knew plaintiff had been employed to superintend the foundry, and knew of payments of salary that were made to plaintiff, supported the finding of the jury that the president was authorized to hire plaintiff.

3. SAME—DE FACTO ORGANIZATION—RECORDING ARTICLES.
   Whether or not the corporate organization was perfected before the execution of plaintiff's contract of employment, defendant was liable for services thereafter performed under the contract, its officers and directors having notice, and the parties having dealt with defendant as a corporation.

Error to Wayne; Murphy, J. Submitted June 20, 1913. (Docket No. 41.) Decided July 18, 1913.

[1] As to the time for which contracts of employment may be made on behalf of a corporation by its officers, directors, and agents, see note in 49 L. R. A. 471.

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Assumpsit by Thaddeus Galvin against the Detroit Steering Wheel & Windshield Company for breach of a contract of employment. Judgment for plaintiff. Defendant brings error. Affirmed.

Choate, Webster, Robertson & Lehmann, for appellant.

Washington I. Robinson, for appellee.

STONE, J. A reference to the declaration and bill of particulars in this case shows that the action was in assumpsit to recover a balance claimed to be due plaintiff for salary due from the defendant by reason of a wrongful discharge of plaintiff from service. The balance claimed covered the period from March 15, 1910, to November 11, 1910, according to the terms of an alleged contract entered into whereby plaintiff was to be employed for the period of one year from and after November 11, 1909 (upon the trial amended to read November 12, 1909), at the rate of $1,500 per year. Also for money claimed to be due plaintiff from defendant for supplying basic mixture and manufacturing manganese bronze according to the terms of a certain contract. There was originally a further claim for certain royalties due the plaintiff on certain patents under a written contract between the parties, but during the trial, after a considerable colloquy between the court and counsel, all of the last-named claim was withdrawn from the consideration of the jury; the court in the presence of the jury saying:

"Then, by consent, all the testimony in the case given by the plaintiff in behalf of the plaintiff and on behalf of the defendant relating to the issue of patents is stricken out, gentlemen of the jury, and withdrawn from your consideration, and you are to endeavor to remove it from your minds as if it had not been introduced at all."

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The case thereafter proceeded under the claims for salary, and the amount due for the manufacture of manganese.

It appears that for a number of years prior to November, 1909, the plaintiff and his son were the principal owners of the Galvin Brass Company, engaged in manufacturing automobile windshields, at Detroit. Albert S. Keen and two others were copartners manufacturing automobile steering wheels.

On November 4, 1909, a written agreement was signed by the plaintiff and the members of the said copartnership. This agreement provided for the formation of a corporation to be known as the Detroit Steering Wheel & Windshield Company on or before January 1, 1910. It also provided that the plaintiff should be elected vice president of the company and should have charge of its foundry. Under date of November 11, 1909, the articles of incorporation of the defendant company were signed and acknowledged. They were filed with the secretary of State November 13, 1909, and with the county clerk November 16, 1909. Of the 5,000 shares of stock subscribed for, Albert S. Keen held individually 1,750 and as trustee 1,000 shares, and he was elected the president of the company. It was the claim of the plaintiff, and he gave evidence tending to show, that Albert S. Keen from the start handled the business of the corporation and made the contracts. There is some question whether the articles of incorporation were in fact executed on November 11th or 12th.

The claim of the plaintiff upon the trial was that on November 12, 1909, and after the articles were executed, and after Mr. Keen had been elected the president, a verbal contract of employment of plaintiff was entered into with defendant company, acting by and through Mr. Keen, its president, by the terms of which plaintiff was to have charge of defendant's foundry for one year with a salary of $1,500; that

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he entered upon the performance of the contract of employment, receiving his pay weekly at the rate of $1,500 a year, and continued in such employment until March 21, 1910, when he was discharged by the president. Upon the trial Mr. Keen swore that he hired the plaintiff but claimed that it was a monthly hiring. He did not deny, but testified, that plaintiff entered the employment of defendant and continued until he was by him discharged in March, 1910. There was much conflict in the evidence.

The case was submitted to the jury upon a full and fair charge, and a verdict was rendered for the plaintiff for the remainder of the year's salary, amounting to $1,046.46; the jury having disallowed the claim for manganese. There was a motion for a new trial which was denied, which denial was excepted to, and the defendant has brought the case here for review upon writ of error.

The statement of the facts in appellant's brief is very unsatisfactory, and there seems to have been no attempt to comply with rule 40. We have, however, examined the record and shall consider the three principal questions in the case.

Under the assignments of error based upon the refusal of the court to direct a verdict for the defendant at the conclusion of plaintiff's testimony and at the conclusion of the entire case, counsel for appellant say:

"These assignments raise the main question in this case as to the oral agreements being within the statute of frauds, as to the authority of the officer of the defendant company to make the agreements, and as to the validity of the agreements because made before the complete organization of the company. There are three verbal or oral agreements testified to by plaintiff and denied by defendant, one on November 4, 1909, another November 11, 1909, and another on November 12, 1909. The written agreement of No-

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vember 4, 1909, provided for the employment of the plaintiff generally but is wholly silent as to the salary or term of employment."

1. We have already stated that the agreement of November 4, 1909, made before the articles of incorporation were executed, and made not by the defendant but by the proposed incorporators, provided that the plaintiff should have charge of the foundry. We agree with counsel that it was entirely silent as to salary or term of employment. We do not understand that the plaintiff relies upon this agreement or upon any oral agreement of that date for recovery here, but upon an oral agreement claimed to have been made on November 11th or 12th (the exact date being indefinite) and after the articles were executed and after Mr. Keen was elected president. Notwithstanding any agreement which may have existed between the incorporators, it is difficult to understand why a subsequent valid oral agreement may not have been made with the defendant. That was the question which the court submitted to the jury. The court in its charge said:

"It is the plaintiff's claim that he had an oral contract of employment for the term of one year, beginning November 12, 1909, at a fixed sum of $1,500 a year. And it is his claim that, that contract having been entered into, he was improperly discharged on the 21st day of March, 1910."

We cannot agree with the contention that the statute of frauds has any application here. The only agreement submitted to the jury was one to be performed within one year.

2. Was there authority in Mr. Keen, under the circumstances, to make the agreement claimed for the defendant? The record is silent as to any action on the subject by the directors. The plaintiff claimed and testified that from the first Mr. Keen took charge of and handled the business and made the contracts

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for the defendant and was really the general manager, and that all of the directors and officers knew of plaintiff's employment and of payments made to him. We think there was evidence of authority in Mr. Keen, as president and manager, to make the contract, and that the following cases support that view: *Adams Mining Co.* v. *Senter*, 26 Mich. 73-76; *Eureka Iron & Steel Works* v. *Bresnahan*, 60 Mich. 332 (27 N. W. 524); *Whitaker* v. *Kilroy*, 70 Mich. 635 (38 N. W. 606); *Ceeder* v. *Lumber Co.*, 86 Mich. 541 (49 N. W. 575, 24 Am. St. Rep. 134); 10 Cyc. p. 909.

It may also be said that the acts of Mr. Keen were ratified by the directors and officers. We have examined the cases cited by appellant, and do not think that they are controlling of the instant case.

3. Was the claimed contract made before the complete organization of the defendant company? The articles of incorporation are not contained in the record. We understand, however, that the defendant was organized under the provisions of Act No. 232, Pub. Acts 1903 (4 How. Stat. [2d Ed.] § 9532 *et seq.*). Section 9 of that act provides as follows:

"Before any corporation, organized under this act to operate in this State, shall commence business, the president shall cause the articles of association to be recorded, at the expense of said corporation, in the office of the secretary of State of this State, and in the office of the county clerk of the county in which such operations are to be carried on."

We are of opinion that what we said and held in *Newcomb-Endicott Co.* v. *Fee*, 167 Mich. 574 (133 N. W. 540), is applicable here, and that this question is governed by that case.

We have examined the other assignments of error. Many of them are not based upon any exception. The charge of the court sufficiently covered such of defendant's requests to charge as correctly stated the

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law applicable to the case. The court did not err in refusing the motion for a new trial.

We find no prejudicial error in the record, and the judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, OSTRANDER, and BIRD, JJ., concurred.

ISLAND MILL LUMBER CO. v. CITY OF ALPENA.

1. TAXATION—VALUATION FOR PURPOSES OF ASSESSMENT—FRAUD.
   Evidence that the assessed valuation of plaintiff's real estate was increased by the State tax commission from $20,000 to $35,000, that the property was worth from $20,000 to $25,000, that other property was similarly treated at the same time, so that plaintiff's total taxes were reduced, that the State tax commission had at the same time raised the total assessed valuation of the city from $6,071,380, as fixed by the local authorities, to $9,417,245, is insufficient to show fraud or bad faith.

2. SAME.
   It will be presumed that the members of the tax commission exercised honesty and their best judgment in performing their official duty: the burden is on the plaintiff, in an action to recover back taxes paid under protest, to establish fraud, which cannot be inferred from a mere difference in judgment.

3. FRAUD—EVIDENCE—TAXATION.
   An assessment is not fraudulent merely because the valuation is excessive, unless an improper motive is shown: but if it is purposely made too high through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all competent persons, that tax is invalid.

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Error to Alpena; Emerick, J. Submitted June 16, 1913. (Docket No. 128.) Decided July 18, 1913.

Assumpsit by the Island Mill Lumber Company against the city of Alpena for the recovery of taxes paid under protest. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Joseph H. Cobb, for appellant.

Guy D. Henry, for appellee.

STEERE, C. J. Plaintiff, a Michigan corporation owning property and engaged in the lumber business in the city of Alpena, brought this action against said city to recover back an amount of taxes paid under duress and protest, claiming that the same had been fraudulently assessed by reason of intentional overvaluation of the property upon which the taxes were levied. The case was tried before a jury in the circuit court of Alpena county on September 17, 1912, and at the conclusion of the evidence the court directed a verdict for defendant on the ground that the testimony produced by plaintiff was not sufficient to raise an issue of fact on the question of wilful, intentional, and fraudulent overvaluation of plaintiff's property for taxation purposes.

Plaintiff's assignments of error all relate to the charge of the court in directing a verdict in favor of defendant and present the single question of whether there was probative testimony in the case which tended to show a fraudulent assessment and so raising an issue of fact which should have been submitted to the jury.

For the year 1911 the local assessing officers of Alpena, consisting of the city controller and board of review, assessed taxes against defendant's real estate on a valuation of $20,000 and against its personal property on a valuation of $54,000. Under the law

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upon that subject, the assessment roll was completed earlier for city than for State and county taxes; the latter not being equalized, apportioned, and spread until fall. Only the State and county taxes are involved in this controversy; it being stated in its counsel's brief, and not controverted, that plaintiff paid the city and school taxes assessed against it in July on the valuations as made by the local officers.

Before the time arrived for equalizing, apportioning, and spreading the State and county taxes upon the assessment roll, the board of State tax commissioners reviewed the roll, under the authority given said board by statute, and appraised the property throughout the city for taxation purposes, which resulted in an increase of the aggregate assessed valuation throughout the city of 55 per cent. In this review of the roll plaintiff's real estate was valued for taxation at $35,000 and its personal property at $64,500. The State and county taxes were levied and spread upon such revision of the roll and revaluation. Plaintiff declined to pay its taxes on that basis, and the city treasurer levied upon and was about to sell certain of its personal property to collect such taxes, when plaintiff paid them under protest as stated.

Plaintiff's declaration charges fraudulent assessment of both its real and personal property. During the progress of the trial plaintiff's counsel stated no objection was raised as to the latter, but it was the contention that the board of State tax commissioners had acted knowingly, intentionally, and fraudulently in fixing the valuation on plaintiff's real estate for taxation purposes, as shown. In support of this contention, plaintiff introduced the testimony of three witnesses as to value: R. H. Rayburn, its president and manager; William H. Campbell, its vice president; and William Marion, the superintendent of another sawmill in the city. The two officers of plain-

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tiff placed the value of its real estate at $20,000, Marion at from $20,000 to $25,000.

These witnesses made comparison of plaintiff's mill with other mills with somewhat varying views. The witnesses were parties interested in the taxation of such property. They were giving their estimate and judgment of valuations from their point of view. To review their examinations and cross-examinations, with a view of weighing the relative strength or weakness of their testimony, would be foreign to this inquiry. If their testimony, taken at its strongest, had any probative force to establish fraudulent conduct on the part of the tax commission, it was for the jury to weigh. We must assume that they testified honestly, as they viewed the matter, and gave their best judgment. The assumption of honesty and the exercise of their best judgment obtains also as to the members of the tax commission in the performance of their official duties, and with it goes extensive experience throughout the State in reviewing tax rolls and appraising property for taxation purposes. The burden is upon the plaintiff to prove to the contrary and show fraud. Does the shown diversity of opinion between these parties as to values raise that issue? Fraud cannot be predicated upon or inferred from an honest difference in judgment. Aside from the overvaluation, according to plaintiff's witnesses, there is no evidence of design against plaintiff or of a discriminating overvaluation to its injury from which wrongful or fraudulent purpose or intent is to be inferred. The result of this revision of the assessment roll indicates the contrary. Plaintiff was benefited by it, taken as a whole.

The entire assessment roll of the city of Alpena was in evidence and before the court showing the valuation first made by the local officers and as revised by the commission. As bearing on the question of wilful, intentional, and fraudulent assessment, it was proper

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evidence to consider in passing upon the probative force of the testimony of plaintiff's witnesses and in determining whether it tended to raise an issue upon that question. By this assessment roll it is shown that the whole amount of taxes to be levied that year was $75,322.20. The assessed valuation of taxable property as fixed by the local assessors was $6,071,380, made up of real property $4,056,665 and personal $2,014,725; the rate of State and county taxes on such basis being .0124. As raised and fixed by the State tax commission, the total assessed valuation of taxable property was $9,417,245 (an increase of $3,071,380), made up of real property $6,392,895 and personal $3,024,350; the rate of State and county taxes on such basis being .008 per cent.

Plaintiff's taxes on real estate as valued by the local assessors would be $248, and as valued by the tax commission was $280, or an increase of $32; but plaintiff's taxes on personal property as valued by the local assessors would be $675.80 and as valued by the tax commission $516, or a reduction of $159.80. As a total result of the action of the tax commission in revising the assessment roll of that year, plaintiff's entire taxes were reduced $127.80.

When the only claim of proof of fraud is the inference to be drawn from proof of overvaluation, we think the above result is proper to consider in determining whether or not any inferences of intentional fraud or injury can be legitimately drawn from the evidence in the case considered as a whole. Fraud cannot be presumed from mere suspicion nor from facts and circumstances which are entirely consistent with an honest purpose. *Henneberger* v. *Matter,* 88 Mich. 396 (50 N. W. 369).

Counsel for plaintiff contend that the question of fraud is never a question of law but is always held by all courts to be a question of fact for the jury, citing numerous cases. This is unquestionably correct,

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when there is in the case legitimate evidence of fraud to raise the issue, but whether or not there is any probative evidence of fraud in the case is a question of law for the court. Fraud is never presumed; there must be evidence tending to prove it. The law upon the question of fraudulent overvaluation for taxation purposes is well settled in this State. It must be something more than an honest mistake in judgment to defeat a tax.

In 2 Cooley on Taxation (3d Ed.), p. 1459, it is said:

"An assessment is not fraudulent merely because of being excessive, if the assessors have not acted from improper motive; but if it is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons, * * * the case is a plain one for the equitable remedy by injunction."

In such case the tax is necessarily invalid.

The above rule has been quoted by this court with approval and consistently followed. The subject is exhaustively discussed, with citation of numerous authorities, in *Pioneer Iron Co.* v. *City of Negaunee*, 116 Mich. 430 (74 N. W. 700), and *City of Muskegon* v. *Boyce*, 123 Mich. 535 (82 N. W. 264).

Considering the testimony produced in this case in its most favorable aspect for plaintiff, we conclude, with the trial court, that it fails to present any evidence legitimately tending to sustain the charge that the board of State tax commissioners, in disregard of duty, recklessly, intentionally and fraudulently overvalued plaintiff's property for taxation, or that thereby plaintiff was compelled to pay more than its just proportion of the taxes.

The action of the trial court in directing a verdict for defendant is sustained, and the judgment is affirmed.

MOORE, MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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ROBSON *v.* TOWNLEY.

1. MORTGAGES—DEED AS SECURITY—VENDOR AND PURCHASER—ESTATES BY ENTIRETY.
   In a suit for partition brought by one of the heirs of decedent, who had executed a deed of his farm to a third party, receiving back a contract for reconveyance to decedent and his wife by the entirety, the purpose being to secure the grantee for money advanced, the rights of the parties are to be determined by the contract, and although the deed was in the nature of a mortgage or security for a debt, the rights of decedent passed at his death to the wife, and the children obtained no interest in the real property.

2. SAME—WAIVER—HUSBAND AND WIFE.
   The wife did not waive her legal rights by accepting a quitclaim deed from the grantee or mortgagee, upon full performance of the contract.

Appeal from Chippewa; Shepherd, J. Submitted June 12, 1913. (Docket No. 86.) Decided July 18, 1913. Rehearing denied January 5, 1914.

Bill by John Robson against Margaret Townley and others for partition. From a decree for defendants, complainant appeals. Affirmed.

George P. Stone and *George A. Cady,* for complainant.

M. M. Larmonth and *H. L. Parsille,* for defendants.

KUHN, J. The circuit judge who heard this case filed the following statement of facts, which concisely gives the history of the transactions which led up to this litigation:

"On or about April 10, 1880, William Robson made homestead entry for the land described in the bill of

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complaint in this cause, and made final proof thereon April 2, 1887. On May 5, 1887, the records show that Robson and his wife, Elizabeth, mortgaged this land to the Sault Savings Bank of this city, which mortgage was foreclosed and the sheriff's deed executed to said mortgagee on August 4, 1890. On July 29, 1891, Robson and his wife executed a quitclaim deed conveying the land to Norman H. Wells. On August 1, 1891, the land was redeemed from the sheriff's sale, and the mortgage to the Sault Savings Bank thereby discharged. On March 10, 1894, a suit was instituted by Robson to have the deed to Wells declared a mortgage. In a cross-bill filed in this suit by Wells, he admits the transaction was a mortgage in effect, and prays for the foreclosure of the same. And on February 17, 1897, a decree was entered declaring the deed to be a mortgage, and providing for the foreclosure sale and immediate possession to be given to the purchaser at any time after July 1, 1897. On August 13, 1897, Robson and wife executed a special warranty deed running to David Brown; the special clause being the exception in the warranty of the mortgage given to Norman H. Wells. On September 25, 1897, David Brown, William Robson, and Elizabeth Robson entered into a contract whereby, upon payment of a stipulated amount to be made in payments and at times therein stipulated, Brown was to convey to William Robson and Elizabeth Robson, his wife, by warranty deed, the said land free and clear of all incumbrance, except such as may have accrued upon said land subsequent to that date, or through the acts or negligence of the parties of the second part. All the payments on this contract were made by Elizabeth Robson and all the receipts taken in her name, individually. On June 22, 1901, Elizabeth Robson, individually, executed a mortgage to the Sault Savings Bank in the sum of $930, and on the same day a quitclaim deed, executed by David Brown and wife, was given to Elizabeth Robson. On August 16, 1901, William Robson died. On April 18, 1903, Mrs. Robson executed in proper form a will devising the land to the three boys who had remained on the farm, dividing the land equally among them. On June 4, 1911, Mrs. Robson died. Referring to the date upon which the deed from William Robson and

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his wife to Brown was made, it appears that on the last day, to save the farm from the sale under the Wells mortgage, William Robson and his wife called upon Brown at his home and implored him to save the farm; that Mrs. Robson conducted the business for the family; that Mr. Robson was a heavy drinker and could not be trusted with money; that an arrangement was effected whereby Brown took up the Wells mortgage, paying Wells himself, and also took a warranty deed from Robson and wife, subject to the Wells mortgage. There is nothing in the testimony to show why the contract for a resale or instrument of defeasance was dated over a month subsequent to the execution of the deed to Brown. No explanation is given why it provided for a reconveyance to Robson and wife rather than to Robson alone."

The bill of complaint is filed to obtain a decree declaring the deed from William Robson and wife to Brown to have been a mortgage, and adjudging that William Robson died seised of the title in fee to the land in question, subject only to the mortgage to the bank and the dower rights of the widow; and that at the death of Elizabeth Robson the 10 surviving children and heirs at law of William Robson were seised of an indefeasible title and right of possession, as such heirs, to ten-elevenths of the premises. There were 11 children, but one daughter died about 2½ years after the death of the father, and at the time of her death was above the age of 21 years, unmarried, and left no heirs of her body. The bill prayed that the land might by said decree be partitioned to them, respectively, as their respective rights and interests might appear.

It is the contention of the complainant that William Robson, Sr., never parted with the fee title to the land in question, and the deed to Brown and the contract given by him to Robson and wife together constituted a mortgage. The contention of defendants is that as Robson and his wife were about to lose the property under the Wells mortgage they agreed to deed their

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equity of redemption to Brown, and that Brown by the warranty deed which was given received the legal and equitable title to the premises. By the contract which was subsequently given to them it was agreed that when the terms were complied with the full title to the land would go to Robson and his wife by the entireties. The trial judge, who heard the proofs, dismissed the bill, and complainant appeals.

The rights of the parties, it seems to us, should be determined by the contract which was made. It is not unreasonable to assume that, in view of the habits of her husband and his inability to save any money, Mrs. Robson should insist that the contract make provision so that, when she had by her own efforts paid for the property, she would be protected. *Barber* v. *Milner*, 43 Mich. 248 (5 N. W. 92). The fact that she took a quitclaim deed from Brown does not affect her legal rights. She waived nothing by taking it. *Lamore* v. *Frisbie*, 42 Mich. 186 (3 N. W. 910).

Under the contract, upon compliance with its terms, Robson and his wife were entitled to have a deed from Brown creating the estate by the entireties, which, on the death of Robson, would have gone to his wife by the right of survivorship. If Robson had outlived his wife, unquestionably his heirs would have been entitled to inherit. It therefore clearly appears that if the contract had been carried out the situation would have been the same as now left by the decree of the court, and complainant has no right to complain, and is not entitled to the relief prayed for.

The decree is affirmed, with costs.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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GERMAINE v. GOVERNOR.

1. CONSTITUTIONAL LAW—CERTIORARI—PUBLIC OFFICERS, REMOVAL—SEPARATION OF DEPARTMENTS OF GOVERNMENT.

   Certiorari does not lie to review the determination of the governor of the State removing from office the mayor of Traverse City, in proceedings under 1 Comp. Laws, § 1159 (1 How. Stat. [2d Ed.] § 1310). To permit judicial review of such removal proceedings in an action directly against the governor would invade the functions of the executive department and violate the Constitution, art. 4, §§ 1, 2.

2. SAME.

   It is not important in Michigan whether the act of the executive is ministerial or judicial in its nature; the judicial department is not authorized to interfere with the determination of a co-ordinate branch of the government, although the courts may exercise jurisdiction to pass upon the validity of the proceedings in a cause arising between private parties claiming rights thereunder.

On motion to quash a writ of certiorari issued at the petition of William D. C. Germaine against Woodbridge N. Ferris, governor of the State of Michigan, to review proceedings wherein petitioner was removed from the office of mayor of Traverse City. Submitted June 24, 1913. (Calendar No. 25,698.) Writ quashed July 18, 1913.

Grant Fellows, Attorney General, for the motion.

Parm C. Gilbert (John J. Tweddle, of counsel), *contra.*

KUHN, J. This is a motion to enter an order quashing a writ of certiorari heretofore issued by this court. The reasons urged in support of the motion are as follows:

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"(1) That this court has no jurisdiction to review, by writ of certiorari directed to the governor, any action of the governor in the discharge of his official duties under the Constitution and laws of the State.

"(2) That under the Constitution and laws of the State of Michigan the executive and judicial branches of the State are co-ordinate, and that the action of the executive department of the State government is not subject to review by the judiciary upon writ of certiorari directed to the executive branch of the State government.

"(3) Because the action of respondent here sought to be reviewed was the exercise of an official discretion belonging to the executive and not reviewable upon certiorari."

The respondent, as governor of the State, by virtue of authority given him by section 1159, 1 Comp. Laws (1 How. Stat. [2d Ed.] § 1310), made an order removing the petitioner from the office of mayor of Traverse City. The section reads as follows:

"The governor may remove all county officers chosen by the electors of any county or appointed by him, and shall also remove all justices of the peace and township officers chosen by the electors of any township, or city or village officers chosen by the electors of any city or village, when he shall be satisfied from sufficient evidence submitted to him, as hereinafter provided, that such officer is incompetent to execute properly the duties of his office, or has been guilty of official misconduct, or of wilful neglect of duty, or of extortion, or habitual drunkenness, or has been convicted of being drunk, or whenever it shall appear by a certified copy of the judgment of a court of record of this State that such officer after his election or appointment shall have been convicted of a felony; but the governor shall take no action upon any such charges made to him against any such officer until the same shall have been exhibited to him in writing, verified by the affidavit of the party making them, that he believes the charges to be true, with a statement of the prosecuting attorney of the county, that in his opinion the case demands investigation. But no such officer shall be removed for such miscon-

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duct or neglect unless charges thereof shall have been exhibited to the governor, as above provided, and a copy of the same served on such officer, and an opportunity given him of being heard in his defense."

The power conferred by this statute was not granted to the person who is the incumbent of the executive office as a private person, but it is conferred upon the governor in his official capacity. The power pertains to the office of governor, and when he acts by virtue of the statute it is an executive action and it is none the less an official act of the governor because the power might have been intrusted to some other person or authority.

It is urged that the governor in this proceeding acted judicially and that therefore such action is subject to review by certiorari, and in support of that position the case of *Dullam* v. *Willson,* 53 Mich. 392 (19 N. W. 112, 51 Am. Rep. 128), is relied upon. In that proceeding, however, no process was issued against the governor direct, and the validity of the removal proceeding was raised by quo warranto. This is the first instance called to our attention in our State where an attempt is made to review the action of the governor of the State by a writ of certiorari. Granting that the contention of counsel for petitioner is correct, that the function performed by the executive in the removal proceedings is quasi judicial in character, the fact still remains that it is an official action of the governor, and the question arises whether an effort to review his action by proceeding directly against him would not involve the fundamental proposition that such review would be an invasion by the judiciary of the executive functions of our government.

Article 4 of the Constitution of this State, on the subject of the division of the powers of government, provides:

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"SECTION 1. The powers of government are divided into three departments: The legislative, executive, and judicial.

"SEC. 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this Constitution."

The question of whether mandamus will lie to compel the governor of a State to perform duties imposed upon him has been raised in this State and in many other jurisdictions. It is well settled by all authorities that mandamus will not lie to compel the governor to perform duties of a purely executive or political character, but the decisions are not uniform as to the power of the court to compel the governor to discharge those duties which, as to other officials, are usually called ministerial. However, this question has been settled in this State by the very instructive case of *People, ex rel. Sutherland,* v. *Governor,* 29 Mich. 320 (18 Am. Rep. 89). The application in this case was for mandamus to require the governor to issue his certificate showing that the Portage lake and Lake Superior ship canal and harbor had been constructed in conformity with the acts of congress making a land grant for the same and the acts of the legislature of this State conferring the grant upon a corporation which the relators claimed to represent, and it was urged that the act sought to be compelled by mandamus was a purely ministerial one. Mr. Justice COOLEY, in the able opinion in that case, discusses at length the question of the jurisdiction of the court to review the action of the executive by proceeding directly against him and declined to distinguish between those acts which are political and those which are ministerial. His reasoning is so clear and instructive and so controlling of the present question that we quote the following (29 Mich., on pages 322-325 [18 Am. Rep. 89]):

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"There is no very clear and palpable line of distinction between those duties of the governor which are political and those which are to be considered ministerial merely; and if we should undertake to draw one, and to declare that in all cases falling on one side the line the governor was subject to judicial process, and in all falling on the other he was independent of it, we should open the doors to an endless train of litigation, and the cases would be numerous in which neither the governor nor the parties would be able to determine whether his conclusion was, under the law, to be final, and the courts would be appealed to by every dissatisfied party to subject a co-ordinate department of the government to their jurisdiction. However desirable a power in the judiciary to interfere in such cases might seem from the standpoint of interested parties, it is manifest that harmony of action between the executive and judicial departments would be directly threatened, and that the exercise of such power could only be justified on most imperative reasons. Moreover, it is not customary in our republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon the chief executive of the State rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties. And if we concede that cases may be pointed out in which it is manifest that the governor is left to no discretion, the present is certainly not among them, for here, by the law, he is required to judge, on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer, or department.

"We are not disposed, however, in the present case, to attempt on any grounds to distinguish it from other cases of executive duty with a view to lay down a narrow rule which, while disposing of this motion, may leave the grave question it presents to be presented again and again in other cases which the

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ingenuity of counsel may be able to distinguish in some minor particulars from the one before us. If a broad general principle underlies all these cases, and requires the same decision in all, it would scarcely be respectful to the governor or consistent with our own sense of duty, that we should seek to avoid its application and strive to decide each in succession upon some narrow and perhaps technical point peculiar to the special case, if such might be discovered.

"And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the Constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.

"It is true that neither of the departments can operate in all respects independently of the others, and that what are called the checks and balances of government constitute each a restraint upon the rest. The legislature prescribes rules of action for the courts, and in many particulars may increase or diminish their jurisdiction; it also, in many cases, may prescribe rules for executive action, and impose duties upon, or take powers from the governor, while in turn the governor may veto legislative acts, and the courts may declare them void where they conflict with the Constitution, notwithstanding, after having been passed by the legislature, they have received the governor's approval. But in each of these cases the action of the department which controls, modifies, or in any manner influences that of another, is had strictly within its own sphere, and for that reason gives no occasion for conflict, controversy, or jealousy. The legislature in prescribing rules for the courts is acting within its proper province in making laws,

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while the courts, in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the Constitution is its equal.

"It has long been a maxim in this country that the legislature cannot dictate to the courts what their judgments shall be or set aside or alter such judgments after they have been rendered. If it could, constitutional liberty would cease to exist; and if the legislature could in like manner override executive action also, the government would become only a despotism under popular forms. On the other hand it would be readily conceded that no court can compel the legislature to make or to refrain from making laws, or to meet or adjourn at its command, or to take any action whatsoever, though the duty to take it be made ever so clear by the Constitution or the laws. In these cases the exemption of the one department from the control of the other is not only implied in the framework of government, but is indispensably necessary if any useful apportionment of power is to exist."

Again, 29 Mich., on page 330 of the opinion (18 Am. Rep. 89):

"And while we should concede, if jurisdiction was plainly vested in us, the inability to enforce our judgment would be no sufficient reason for failing to pronounce it, especially against an officer who would be presumed ready and anxious in all cases to render obedience to the law, yet in a case where jurisdiction is involved in doubt it is not consistent with the dignity of the court to pronounce judgments which may be disregarded with impunity, nor with that of the executive to place him in a position where, in a

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matter within his own province, he must act contrary to his judgment, or stand convicted of a disregard of the laws.

"But it is said that this conclusion will leave parties who have rights, in many cases, without remedy. Practically, there are a great many such cases, but theoretically, there are none at all. All wrongs, certainly, are not redressed by the judicial department. A party may be deprived of a right by a wrong verdict, or an erroneous ruling of a judge, and though the error may be manifest to all others than those who are to decide upon his rights, he will be without redress. A person lawfully chosen to the legislature may have his seat given by the house to another, and be thus wronged without remedy. A just claim against the State may be rejected by the board of auditors, and neither the governor nor the courts can give relief. A convicted person may conclusively demonstrate his innocence to the governor, and still be denied a pardon. In which one of these cases could the denial of redress by the proper tribunal constitute any ground for interference by any other authority? The law must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action, which, under the Constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision."

The reasoning in this case seems to us to establish the rule in this State that no process of the court can be issued against the governor of this State in any proceeding seeking to review any action performed by him as governor under power conferred upon him either by the Constitution or legislative enactment. In the case of *People, ex rel. Ayres*, v. *Board of State Auditors*, 42 Mich. 422, on page 426 (4 N. W. 274), in citing the *Sutherland Case*, this court said:

"It has also been held that we cannot interfere with

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the discretion of the chief executive of the State or subordinate him to our process."

See, also, *Board of Supervisors* v. *Auditor General*, 27 Mich. 165.

The decisions in those States that have held that a writ may issue to control a ministerial act of the governor rest chiefly upon the case of *Marbury* v. *Madison*, 1 Cranch (U. S.), 137. In speaking of these decisions, Justice COOLEY, in *People, ex rel. Sutherland*, v. *Governor, supra*, 29 Mich., at page 327 (18 Am. Rep. 89), said:

"These cases for the most part are rested upon the dictum of Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch [U. S.], 137, that one of the heads of department in the Federal government might be compelled by mandamus to perform a mere ministerial duty; a dictum which cannot be understood as expressive of the opinion of that eminent judge that the president was subject to the like process, but which is wholly inapplicable to a case like the present, unless it goes to that extent. For it cannot justly be claimed, when Federal and State governments have been formed, so far as distribution of power is concerned, on the same general plan, that the executive of the Union can claim immunity from judicial process any more than the governor of one of the States. In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction; and, as regards such an officer, we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance. When the head of a department acts as the mere assistant or agent of the executive in the performance of a political or discretionary act, he is no more subject to the control of the courts than the chief executive himself; but where a ministerial act is required to be done by him, independently of the executive, though in a certain sense he is an executive officer, it would be as idle

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to dispute his responsibility to legal process, as it would be to make the same claim to exemption on behalf of an officer intrusted with similar duties of a lower grade. This is emphatically the case under the Constitution of this State, which provides for the election of State and inferior officers alike by the people, and makes the chief officers of State below the governor as independent of his control in the performance of their duties as are the officers of the counties or of the townships."

The following instructive cases from other jurisdictions with similar holdings have been called to our attention and examined: *State* v. *Governor*, 25 N. J. Law (1 Dutcher), 331; *Hawkins* v. *Governor*, 1 Ark. 570 (33 Am. Dec. 346); *Mauran* v. *Governor*, 8 R. I. 192 (5 Am. Rep. 564); *People, ex rel. Billings*, v. *Governor*, 19 Ill. 229 (68 Am. Dec. 591); *State, ex rel. Robb*, v. *Governor*, 120 Mo. 428 (25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705); *State, ex rel. Bisbee*, v. *Governor*, 17 Fla. 67; *Appeal of Hartranft, Governor*, 85 Pa. 433 (27 Am. Rep. 667); *Rice* v. *Governor*, 19 Minn. 103 (Gil. 74), (18 Am. Rep. 330); *State, ex rel. Oliver*, v. *Governor*, 22 La. Ann. 1 (2 Am. Rep. 712); *Vicksburg, etc., R. Co.* v. *Governor*, 61 Miss. 102 (48 Am. Rep. 76); *Dennett, Petitioner*, 32 Me. 508 (54 Am. Dec. 602); *Governor* v. *State, ex rel. Schuck*, 127 Ind. 588 (27 N. E. 175, 11 L. R. A. 763, 22 Am. St. Rep. 663).

In the case of *Bates* v. *Taylor*, 87 Tenn. 320, 323 (11 S. W. 266, 3 L. R. A. 316), the *Sutherland Case* is cited with approval and the court said:

"The courts of Ohio, Alabama, California, Maryland, and North Carolina are together in holding that the governor may be required by mandamus to perform duties of the latter class; while the courts of Arkansas, Georgia, Illinois, Louisiana, Maine, Minnesota, New Jersey, and Rhode Island have uniformly held the contrary, upon the ground that the powers of government in the States are distributed among three departments, which, under the organic law, are

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to be and remain independent of each other. High on Extraordinary Legal Remedies, §§ 118, 119, 120, and 121.

"This author cites the cases from the different States mentioned. We have examined them, and also a very instructive case from Michigan *(People, ex rel. Sutherland,* v. *Governor,* 29 Mich. 321 [18 Am. Rep. 89]), which is in accord with those from the States last mentioned, and we are fully persuaded not only that the weight of authority, but also the weight of reason is against the power of the courts to coerce the chief executive of a State into the performance of any official duty."

The attorney general, representing respondent, makes no claim that in a proceeding between A. and B., in which A. asserts some rights by virtue of executive action, that the courts cannot determine the validity of that executive action. This court held, in *Dullam* v. *Willson, supra,* that in such an action the validity of the governor's proceedings could be reviewed and the rights of a person who had been removed from office by the governor, without proper compliance with the requirements of the statute with reference to removals, would be protected. That decision fully lays down the rule applicable in such cases and, in our opinion, affords ample protection against any unwarranted or illegal act on the part of the executive in removal proceedings.

The writ was improvidently issued and must be quashed.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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HOBEN *v.* CITIZENS' TELEPHONE CO.

1. PROCESS—CORPORATIONS—PARTIES—NAME.

   The objection that a defendant was not sued under its correct corporate name must be raised by plea in abatement or is waived. 3 Comp. Laws, § 10473 (5 How. Stat. [2d Ed.] § 13518).

2. JUSTICES OF THE PEACE—SERVICE—APPEARANCE—RETURN OF CONSTABLE.

   The return of a constable that he served a justice's summons "on the 6th day of May, 1903, on Citizens' Telephone Company, the defendant's agent, by delivering to S. E. H. a copy thereof at," etc., did not confer jurisdiction: it was not made to appear that S. E. H. who was served was defendant's agent; and a special appearance on the return day to move to quash the proceedings did not subject the defendant to the jurisdiction of the court.

3. SAME—AMENDMENTS—PROCESS.

   Nor could the jurisdictional defect be aided by amendment. 3 Comp. Laws, §§ 10272, 10273 (5 How. Stat. [2d Ed.] § 12973).

4. SAME—DOCKET.

   The jurisdiction of a justice of the peace must appear affirmatively on the face of the proceedings, and jurisdiction of the defendant must be obtained by proper service of legal process where the defendant does not appear and give such service.

5. SAME.

   Upon a justice's docket showing that the plaintiff proceeded to trial on the adjourned day without waiting an hour for the defendant to appear, the judgment should be reversed on certiorari.

6. SAME—CERTIORARI—RETURN.

   That the testimony of certain witnesses, offered by plaintiff before the justice of the peace, was taken and set out in an affidavit of defendant's attorney for a writ of certiorari, had no tendency to contradict the record which showed a special appearance and no general appearance of the defendant.

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Error to Ottawa; Padgham, J. Submitted June 10, 1913. (Docket No. 55.) Decided September 30, 1913.

Case by Carrie E. Hoben in justice's court against the Citizens' Telephone Company for injuries done to certain trees. Plaintiff obtained a judgment and defendant brought certiorari to the circuit court. Judgment for plaintiff. Defendant brings error. Reversed.

Cross, Vanderwerp, Foote & Ross, for appellant.

Lillie & Osterhous, for appellee.

MCALVAY, J. This suit was commenced May 2, 1903, by plaintiff in justice's court in Ottawa county by a summons in an action of assumpsit against Citizens' Telephone Company, returnable May 12, 1903. The return shows service on May 6, 1903.

As appears from a certified transcript of the original docket entries, the order of proceedings before the justice was as follows: On the return day plaintiff appeared and declared orally against defendant in an action of trespass for damages wrongfully done by it to certain shade trees belonging to plaintiff along the highway, describing the premises and giving the town and county.

One of the attorneys for the defendant appeared specially in said cause for the sole purpose of making a motion to quash the summons and to dismiss the suit. This motion was in writing and for the following reasons:

"(1) The defendant was not sued by its legal name, viz., 'Citizens' Telephone Company, of Muskegon, Mich.'

"(2) The defendant was not a resident of the county of Ottawa, and the suit was commenced by summons made returnable ten days from the date thereof.

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"(3) The justice of the peace did not obtain jurisdiction over the defendant in the suit."

This motion was not passed upon at the time, and by request of plaintiff an adjournment was had until May 26th following at 9 o'clock in the forenoon, when the suit was called and the plaintiff appeared. The motion to quash was denied, and plaintiff proceeded to trial. After hearing the evidence in the case, a judgment was rendered in favor of plaintiff for $70 and costs of suit, taxed at $6.04. The docket does not show that on the return day defendant was not present by its representative.

The cause was removed by writ of certiorari, dated July 3, 1903, to the circuit court for Ottawa county, and was submitted to the court in October, 1904, and was not determined by that court until December 20, 1911, when the judgment of the justice's court was affirmed. The case is before this court for review upon a writ of error, and the errors assigned and relied upon are based upon the rulings of the circuit court in affirming the judgment of the justice's court, in overruling the motion made to quash the proceedings and dismiss the case for want of jurisdiction; that the court erred in holding that a judgment could be recovered under the declaration and in holding that the justice did not lose jurisdiction on the return day by adjourning on request of plaintiff, without a showing on oath, and on the adjourned day by not waiting one hour for defendant to appear. These questions, raised on errors assigned, will be considered in the order presented.

Appellant contends that it was not sued by its legal name, which it claims is "Citizens' Telephone Company of Muskegon, Mich." We call attention to section 10473, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 13518), which provides:

"In suits or proceedings by or against any corpora-

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tion, a mistake in the naming of such corporation shall be pleaded in abatement; and if not so pleaded, shall be deemed to have been waived."

The question could be raised only in the manner pointed out by the statute. No plea in abatement was filed in this case. The irregularity was waived.

It is further contended that the justice of the peace acquired no jurisdiction of the case upon the ground that there was no proper service of the summons upon defendant. The return of service of summons was as follows:

"STATE OF MICHIGAN,
"COUNTY OF OTTAWA—SS.:
"I served the within summons on the 6th day of May, A. D. 1903, on Citizens' Telephone Company, the defendant's agent, by delivering to Sherman E. Hosmer a copy thereof, at the township of Polkton, within said county.

"LEON J. IVES,
"Deputy Sheriff."

It cannot be said that the fair import of this language is that the summons was served upon Sherman E. Hosmer, the agent of the defendant, or that said Hosmer was the agent of defendant. For this reason the justice did not obtain jurisdiction over the defendant. *Kirby Carpenter Co.* v. *Trombley,* 101 Mich. 447 (59 N. W. 809). The appearance of the defendant upon the return day was a special appearance for the purpose of filing a motion to quash. This appears by the docket entry and return of the justice.

Nor can it be said that this jurisdictional defect was aided by our statute of amendments (sections 10272, 10273, 3 Comp. Laws, 5 How. Stat. [2d Ed.] § 12973). It cannot be held that this defect was one "not being against the right and justice of the matter of the suit," within the meaning of the statute; and therefore cannot be amended in this court. The right

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of amendment does not extend to matters of jurisdiction.

The jurisdiction of the justice must appear affirmatively upon the face of the proceedings. *Davison* v. *Davison,* 99 Mich. 625 (58 N. W. 637); *E. S. Knowles & Son* v. *Cavanaugh,* 144 Mich. 260 (107 N. W. 1073); *Wells* v. *Guaranty Co.,* 160 Mich. 213-217 (125 N. W. 57).

It is elementary that jurisdiction of the person of the defendant must be obtained by proper service of legal process, where the defendant does not appear or waive such service. If we are correct in what we have said, it disposes of the case.

But we may add that it appears to us also that there is merit in the ninth assignment of error, which is based upon the ninth allegation of error in the affidavit for certiorari, to wit: That it appears from the docket of the justice that the plaintiff proceeded to the trial of said cause on May 26, 1903, at 9 o'clock in the forenoon, without waiting one hour for the defendant to appear. The docket entry is as follows:

"May 26, 1903, 9 o'clock in the forenoon. Suit called. Plaintiff appears. Motion to quash denied. Plaintiff goes to trial of the cause. William FitzPatrick, John Hoben, and August Bushman sworn.

"After hearing the evidence in the case, I rendered judgment against the defendant and in favor of the plaintiff," etc.

The affidavit for the writ of certiorari was made by John Vanderwerp, as attorney for defendant, in the original suit. He therein states, among other things, that—

"On the 26th day of May, 1903, at 9 o'clock in the forenoon, the plaintiff appeared before said justice, by Walter I. Lillie, her attorney; that the defendant did not appear; that the motion to quash made by said defendant on the 12th day of May, 1903, was denied by said justice, and the plaintiff went to the trial of said cause."

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The justice in his return to the writ of certiorari certifies that the proceedings in and trial of said cause and the judgment rendered were in all things as alleged and set forth in the affidavit of John Vanderwerp. So it cannot be said, in the light of this evidence and the return, that defendant appeared on the adjourned day simply because the testimony of the witnesses is set forth in the affidavit for the writ. Defendant's attorneys may have very properly sent their stenographer to take such testimony, and certainly that would not have operated as an appearance in the cause. There is nothing in the record to indicate that the defendant was present or took any part in the trial. We think that the case is squarely within the reasoning of this court in *Bossence* v. *Jones,* 46 Mich. 492 (9 N. W. 531), and *Talbot* v. *Kuhn,* 89 Mich. 30 (50 N. W. 791, 28 Am. St. Rep. 273), and that certiorari is the proper and direct way to raise the question. *Harbour* v. *Eldred,* 107 Mich. 95 (64 N. W. 1054); *Miller* v. *Smith,* 115 Mich. 427 (73 N. W. 418, 69 Am. St. Rep. 583).

We think that the justice erred in not waiting one hour for the defendant to appear, and that the circuit court erred in affirming such judgment.

For these errors, the judgment of the circuit court is reversed.

STEERE, C. J., and MOORE, BROOKE, STONE, OSTRANDER, and BIRD, JJ., concurred.

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EBLING *v.* EBLING.

1. SETTING ASIDE INSTRUMENTS—DEEDS—CONSIDERATION, FAILURE OF—EVIDENCE OF ORAL CONTRACT—MODIFYING DEED.

Where defendant and her deceased husband executed a contract in writing to provide support and care to his parents, and in consideration thereof the parents executed a deed of an eighty-acre farm to the son and wife, who failed to carry out the arrangement, and defendant's evidence tended to show an oral agreement to apply the proceeds of certain real estate which complainant purposed to sell towards the construction of a house on the farm, the decree of the circuit court finding against the alleged oral contract was justified: proof of the subsequent oral contract was inadmissible to modify the written instrument; and if it was not intended to change the contract, defendant's failure to perform and breach of the agreement to provide support was without justification.

2. SAME—EQUITY—DECREE.

Held, also, that the decree of the circuit judge based on improvements to the farm less its rental value and the value of certain personal property used by defendant and her deceased husband, and allowance for support to complainants, etc., was justified.

Appeal from Newaygo; Cogger, J. Submitted October 14, 1913. (Docket No. 59.) Decided September 30, 1913.

Bill by Henry Ebling against Clara Ebling to set aside and cancel a deed for failure of consideration and breach of conditions contained in the instrument. From a decree for complainant, but granting a lien on the land in defendant's favor, defendant appeals. Affirmed.

George Luton, for complainant.

Hatch, McAllister & Raymond, for defendant.

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BIRD, J. By reason of age and growing infirmity, the complainant, Henry Ebling, in April, 1907, conveyed to his son, Anthony, and his wife, Clara, the farm of 80 acres upon which he lived in Newaygo county, in consideration of care and support for himself and wife during the remainder of their lives. At the time of the conveyance, complainant was 73 years of age and his wife 57. There was a small incumbrance of $250 on the farm, which was assumed by the grantees. The son and his wife moved onto the farm and worked it for three years. They moved away from it in April, 1910, and thereafter refused to pay the taxes and interest on the mortgage or to furnish complainant and his wife care and support. Soon after moving away from the premises Anthony died. This bill was filed by complainant to have the deed vacated and set aside on the ground of failure to comply with the terms of the contract. The contest is between the old people and the son's widow. Considerable testimony was taken upon the hearing, bearing upon the cause of the son's leaving and also as to the value of the farm when he went into possession and when he went away. The chancellor made a decree setting aside the deed, and upon balancing the equities found the sum of $267 due the defendant, and made it payable on or before nine months from the death of complainant and his wife, or either of them, and further provided that the same should be a lien on the premises. From this decree the widow has appealed.

There seems to be little question but that the terms of the agreement to support the old people and pay the taxes and mortgage were violated by the defendants in leaving the farm. It is practically agreed by both parties that the cause of the trouble which finally terminated in the son's removing from the place was the refusal of the complainant and his wife to apply the proceeds of the sale of certain real estate owned

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by them in the village of Newaygo toward the construction of a new house on the farm. The defendant attempts to justify their leaving on this ground, and the controversies which grew out of it. The complainant and his wife insist that they made no such agreement. It is the claim of the defendant that the complainant and his wife made this promise before they moved onto the farm, and, after making a sale of their property, they refused to carry it out.

The record has failed to convince us that such an agreement was made, but if it were made, as defendant insists, proof of it could not be admitted and used to modify the original contract, because that contract was in writing and must be conclusively presumed to contain the entire agreement of the parties.

If it were a subsequent oral agreement, with no intent to modify the original agreement, the refusal of the complainant and his wife to carry it out would not furnish a legal excuse for the failure of defendants to carry out the prior independent written contract.

The dwelling house which was erected by the son was left in an unfinished state and cost about $1,500, according to the contention of defendant. Towards its construction, complainant and his wife contributed $230 in cash and 8,000 or 9,000 feet of lumber. They retained some of the proceeds of the real estate because, as they stated, their daughter ought to have some of the property.

The trial court found that the defendants had violated their agreement in going away from the place and refusing to comply with its terms, and he decreed a reconveyance of the premises and charged defendant with the rental value thereof for a period of three years, together with the value of certain personal property which was on the farm when they took possession. Also the money contributed by complainant and his wife. As against this the court credited

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her with the care and support of the old people, the taxes, two years' interest paid on the mortgage, and also the increased value of the premises by reason of the erection of the dwelling house thereon. This resulted in a balance in defendant's favor of $247, which is made a lien upon the premises.

Much complaint is made by defendant of the small amount found her due upon the accounting. We have examined with care the separate items allowed each of the parties and are satisfied that the trial court reached a very equitable solution of the whole controversy. We think there is no occasion to go into detail with the separate items making up the accounts.

The decree of the trial court will be affirmed, with costs of this court to complainant.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

VAN SCEIVER v. KING.

1. WITNESSES—EVIDENCE—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEDENT—ESTATES OF DECEDENTS.

   Testimony of defendant, in a foreclosure suit, relating to matters equally within the knowledge of decedent, mortgagee, was incompetent and could not be considered without violating the provisions of 3 Comp. Laws, § 10212 (5 How. Stat. [2d Ed.] § 12856), as amended.

2. EVIDENCE—BURDEN OF PROOF—PAYMENT—APPLICATION.

   It is incumbent upon the creditor to whom payments have been made to show by a preponderance of the evidence what application was made of the amounts received.

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3. PAYMENT—ELECTION TO APPLY—EQUITY.

The debtor may elect which of two or more debts shall be credited with a payment: the creditor has the right to elect if he does not; and if the amount received is not applied by either party, equity may make such application as may be fair between the parties.

Appeal from Lapeer; Smith, J. Submitted November 19, 1912. (Docket No. 121.) Decided September 30, 1913.

Bill by Nellie F. Van Sceiver against Robert King to foreclose a mortgage. From a decree for complainant, awarding less than the relief claimed, she appeals. Affirmed.

John Loughnane, for complainant.

Geer, Williams & Halpin, for defendant.

BIRD, J. This proceeding was begun to foreclose a real estate mortgage given by Mary Gordon in October, 1887, to James H. Gray, who is now deceased. Complainant is the daughter of James H. Gray, and succeeded him in the ownership of the mortgage. The defendant King is a subsequent purchaser of the premises. The only question raised by the defendant is whether the amount claimed to be due on the mortgage should be reduced by a payment of $150 made by him in November, 1905. It appears that defendant King had been engaged in business for several years, and from time to time had borrowed money from Mr. Gray to meet his business necessities. In November, 1905, when one Lynch came to King to make a payment on a land contract which he had executed with him, King explained to him that he had placed it with Mr. Gray as collateral security for certain loans he had made of him, and directed Mr. Lynch to pay the amount direct to Mr. Gray, at the same time giving

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him a receipt for Mr. Gray to sign, which was as follows:

"Received of Michael Lynch, to apply on contract, or R. King's notes held by me as collateral, $150.00.
"JAMES H. GRAY.
"November 11, 1905."

It is conceded by complainant that the money was paid by Lynch to her father, but she contends that it was afterwards applied on King's indebtedness, but is unable to point out upon what particular loan it was applied. The defendant contends that the payment has never been applied to any of his loans, and as the unsecured loans have all been paid, and as this is the oldest secured obligation that is outstanding, in justice and equity, it ought to be applied thereon.

Defendant King was permitted, over the objection of counsel, to testify as to matters which were equally within the knowledge of the deceased. His testimony cannot be considered in determining the issue, as it was clearly incompetent under the statute, and ought to have been excluded. 3 Comp. Laws, § 10212 (5 How. Stat. [2d Ed.] § 12856).

Passing over this testimony, and other testimony equally incompetent, we are of the opinion that there is enough in the record to warrant the finding that no application of the payment of the $150 was ever made on defendant's loans. It was asserted by the defendant that on November 17, 1905, he paid $150, which was to be applied on his loans. The complainant concedes this, but insists that it was so applied. While the burden of proof is undoubtedly upon defendant, as complainant insists, to show payment, which he asserts, we think the burden of proof is upon the complainant to show where it was applied.

The rule is familiar that a debtor may elect to which of two or more debts his payments shall apply. If he does not so elect, the creditor may elect. The com-

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plainant is here contending, not that the payment was not made, but that it was made and applied. No proof is offered that King elected to have it applied upon any particular loan; therefore, if it were applied, it must have been done by the complainant, and the burden rests with her to show upon which loan it was applied. All of the written obligations in existence at the time of the payment in question were produced upon the hearing, and none of them bore an indorsement of that date, or later, corresponding in amount with the payment.

Complainant indulges in some speculation as to whether the payment may not have been divided and applied upon two loans. This solution of the matter is too uncertain, and does not fairly discharge the burden which rested upon her of showing the application of the payment. We must therefore conclude that the payment was made and never applied in reduction of any of defendant's loans. No application of the payment having been made by the defendant, and none established by the complainant, the court will apply it as justice and equity may require. *Youmans* v. *Heartt*, 34 Mich. 397. Inasmuch as the Gordon mortgage is the only remaining secured loan owing by defendant, it would seem to be equitable to apply it thereon.

The decree of the trial court will be affirmed, with costs of this court to defendant.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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CHAMBERLAIN v. WALLACE.

GARNISHMENT—JURISDICTION—WAIVER OF DEFECTS.

Having appeared in garnishment proceedings and made disclosure without raising any objection to the jurisdiction of the court, after a trial in which the garnishee participated and after the entry of judgment and the lapse of a year and a half subsequent to trial, the garnishee defendant must be *held* to have waived any objections to the sufficiency of process and of service. *Heritage* v. *Armstrong*, 101 Mich. 85 (59 N. W. 439), overruled in part.

Error to Wayne; Hosmer, J. Submitted January 7, 1913. (Docket No. 11.) Decided September 30, 1913.

Garnishment proceedings by Alvinzie H. Chamberlain against Carthagenia Wallace. Judgment for plaintiff. Defendant brings error. Affirmed.

Henry B. Graves, for appellant.

Corliss, Leete & Joslyn (Paul B. Moody, of counsel), for appellee.

MCALVAY, J. The garnishee defendant, against whom a judgment was rendered in favor of plaintiff, has brought the case here for review upon writ of error without settling a bill of exceptions, relying entirely upon the record to show that she is entitled to a reversal. The principal defendant, William R. Wallace, her husband, was a druggist in Detroit and, together with another defendant, was sued by plaintiff for injuries he sustained because of the mistake of a drug clerk in filling a prescription for him at defendant's place of business. The trial resulted in a

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judgment against Wallace for $2,000 on December 15, 1909.

Later plaintiff commenced these proceedings in garnishment against Carthagenia Wallace, who, as already stated, is the wife of the principal defendant, by filing an affidavit and upon it issuing a writ of garnishment January 27, 1910. No question is raised by the appellant as to the regularity or sufficiency of this affidavit and writ of garnishment. It was returnable February 11, 1910, placed in the hands of the sheriff on the date of issue, and was regularly returned by the sheriff not served February 14, 1910. On this date a præcipe for an alias writ of garnishment was filed with the clerk and an alias writ issued, returnable February 28, 1910. This writ was not delivered to the sheriff for service. The record shows that a private individual on March 1, 1910, made an affidavit upon the said writ that he had made diligent search and inquiry for the garnishee defendant and was unable to find her, and the writ was filed on that date. On March 7th following, a præcipe was filed for another alias writ, and the same was issued against this garnishee defendant and Emma M. Hammond, respectively, as garnishees, and was made returnable March 21, 1910. This writ was not placed in the hands of the sheriff for service. On March 29, 1910, a private individual made an affidavit upon it that he had caused diligent search to be made and had been unable to find either of said garnishee defendants. On said date the writ was filed with the clerk and a præcipe for a pluries writ of garnishment against the same defendants as were named in the last preceding writ was filed, and the writ was issued and made returnable April 12, 1910. This was not placed in the hands of the sheriff for service but it was personally served upon appellant, Carthagenia Wallace, March 30, 1910, by a private individual, as appears by his affidavit of service on said writ. Another affi-

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davit shows he later served the writ upon the other garnishee defendant. The record shows but one affidavit in garnishment made and filed at the time the original writ issued against appellant, and no other person is mentioned therein as garnishee.

On April 11th following, appellant filed her disclosure in the case and under oath stated that she had at the time of the service of this writ upon her no money or property in her hands or under her control belonging to the principal defendant, and that she was not indebted to him. After this disclosure, notice was duly given for an examination of this garnishee defendant under the statute, before a circuit court commissioner of Wayne county, on April 28, 1910, and on that date and on May 9th following the plaintiff, by her attorney, and this garnishee defendant appeared before the said circuit court commissioner, where her testimony was taken at length and was afterwards reduced to writing, read over, and signed by her and certified and returned to the court. None of this testimony is contained in this record.

On June 8, 1910, plaintiff demanded an immediate trial of the statutory issue framed in said cause before the court, which came on to be heard in due course; both the plaintiff and the garnishee defendant and their respective attorneys being present and taking part in said trial. The court having found that at the time of the service of the writ of garnishment upon the garnishee defendant she had received from the principal defendant certain property under a conveyance void as to creditors of the principal defendant, amounting to $3,000 and upwards, and that the principal defendant was indebted to plaintiff upon a judgment to the amount of $2,108, and interest to the amount of $118.57, a judgment in favor of the plaintiff and against said garnishee defendant for the total amount, together with costs, was entered February 8, 1911.

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The following additional facts have been stipulated:

"(1) In the principal cause of *Chamberlain* v. *William R. Wallace et al.*, to which this garnishment proceeding is ancillary, George B. Greening, Esq., appeared as attorney for principal defendant William R. Wallace and Henry B. Graves, Esq., as attorney for another defendant. Garnishee defendant is the wife of principal defendant.

"(2) That on the examination of the garnishee defendant before the circuit court commissioner, George B. Greening, Esq., appeared as attorney for garnishee defendant and took part in such examination.

"(3) The trial of the garnishment issue was heard and submitted before the court July 19 and 20, 1910.

"(4) February 9, 1911, on motion of attorney for garnishee defendant, an order was entered for 20 days stay of proceedings and 60 days to settle bill of exceptions.

"(5) February 18, 1911, plaintiff's costs against garnishee defendant were duly taxed and filed.

"(6) March 14, 1911, execution was issued against garnishee defendant.

"(7) March 25, 1911, garnishee defendant made a motion to vacate judgment, to permit her to make application for findings of fact and law, and the same was argued and submitted.

"(8) On February 2, 1912, Henry B. Graves, Esq., was substituted as attorney for garnishee defendant in place of George B. Greening, Esq.

"(9) February 6, 1912, motion for new trial, of which copy is hereto attached, was filed in behalf of garnishee defendant. February 10, 1912, affidavit was filed in opposition thereto, and said motion was thereupon heard and denied."

Two questions are presented by appellant's brief:

"*First.* Are there jurisdictional defects in the garnishment proceeding?

"*Second.* If there are jurisdictional defects in the garnishment proceedings, have they been waived by the garnishee defendant?"

Before proceeding to a discussion and determination of the case, we desire to say that none of the

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questions raised by the assignments of error were at any time presented to and passed upon by the court below but are raised in this court for the first time.

The appellant relies entirely upon the claimed fatal jurisdictional defects appearing in the record and proceedings in the case and contends a garnishee defendant can raise such jurisdictional defects for the first time before this court after judgment, and that no conduct of a garnishee defendant in the case will operate as a waiver of such defects.

The present dispute is between the plaintiff and the garnishee defendant. The principal defendant is not a party to these proceedings. It is contended on the part of plaintiff and apppellee that this garnishee, by her appearance in the case personally and by her attorney, by making a disclosure, by submitting to an examination before a circuit court commissioner, by being present and participating in the trial of the statutory issue in garnishment personally and by attorney, all without objection of any kind or in any manner to the jurisdiction of the court, by waiting for a year and a half after such trial and a year after the entry of judgment against her in the case before raising any questions of jurisdiction, has waived all irregularities of all kinds in the proceedings and is now estopped from questioning this judgment against her by her own conduct. There is abundant authority in other jurisdictions which supports such contention. *Wickham* v. *Lumber Co.*, 89 Wis. 23 (61 N. W. 287).

This court in an early case recognized such a contention. In *Hebel* v. *Insurance Co.*, 33 Mich. 400, Mr. Justice GRAVES, speaking for the court, said:

"It is material to distinguish between the attitude of these parties and this controversy, and the state of things when the garnishor and garnishee are contending about the consequences and results of garnishee proceedings which have taken place between

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them. Many things may take place in the course of such proceedings which the garnishee, on the one hand, or the garnishor, on the other, may be bound or estopped by, as between themselves, but which the garnishee may not be able to urge as matter of defense against the suit of the principal defendant. Still there is no question of the right of one prosecuted as garnishee to make many admissions and waivers without endangering his protection. He need not wait to be led by the shoulder into court. He need not wage battle at every step. The law itself not only recognizes his right to suffer default, but provides what the practice shall be in such case, and invests the judgment with the same protective force as it does one awarded after vigorous contest. Still the proceeding must have a beginning agreeable to its nature, in order to hold the principal defendant, and the nature of the proceeding requires that the law shall be brought to bear directly against the right of the principal defendant in the hands or under the control of the garnishee, and the mode, and the only one, provided for this is by service of the process on, or submission to service by, some one competent in law to receive service. The law itself must be caused to attach, and it can be effected in no other way. Independent and spontaneous submission by the custodian or debtor of the right belonging to the principal defendant cannot bind him. The intervention of the law, according to its own substantial appointments, can alone initiate compulsory novation. A garnishee may admit away his own right over which he has power, but he cannot admit away another's right over which he has no power."

In *Johnson* v. *Dexter*, 38 Mich. 695, at page 697, Mr. Justice COOLEY, speaking for the court, in referring to the matter of waiver by a garnishee, said:

"Perhaps as between themselves and Tower & Mills, the garnishees may have bound themselves by their voluntary appearance; but this would have been on the ground of waiver, and they had no power to waive a compliance with the law for Dexter."

In *Lichtenberg* v. *Wayne Circuit Judge*, 106 Mich.

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38, at page 40 (63 N. W. 963), Mr. Justice MONTGOMERY, speaking for the court, said:

"There may be cases in which the garnishee cannot set up the judgment as a defense to the demand of the principal defendant, even though a valid judgment has passed against him. If so, it is not of any concern to the principal defendant that the garnishee defendant has by his own act made possible a valid judgment against himself. *Hebel* v. *Insurance Co.*, 33 Mich. 400; *Johnson* v. *Dexter*, 38 Mich. 695. If it be true, then, that the garnishee may waive irregularities in such manner as to bind him, such waiver binds him finally; and, if it be not binding upon the principal defendant, his remedy is in a suit against his debtor, the garnishee."

In *Keppel* v. *Moore*, 66 Mich. 292, at page 294 (33 N. W. 499), in an opinion written by Chief Justice CAMPBELL, this court said:

"It is substantially admitted that the affidavit is technically defective; and it is also not denied that, usually, a garnishee cannot waive anything affecting the rights of other parties; but there can be no doubt that he can waive any of his own rights."

See, also, *Wellover* v. *Soule*, 30 Mich. 481.

Appellant relies for Michigan authority upon two cases. The first case (*Ettelsohn* v. *Insurance Co.*, 64 Mich. 331 [31 N. W. 201]) was an opinion by a divided court. The other (*Heritage* v. *Armstrong*, 101 Mich. 85 [59 N. W. 439]) relies upon the first case just cited. It is improbable that it was intended to decide the exact point involved in the instant case, because it is exactly opposite to the opinions expressed by this court in the cases from which we have quoted. In *Lichtenberg* v. *Wayne Circuit Judge*, *supra*, decided one year later, the same justices sitting concurred unanimously. In so far as that case may be considered to conflict with the opinion herein expressed, it must be overruled as not in harmony with

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the opinions of this court and the weight of the authorities.

Under the undisputed facts presented by this record, we are satisfied that the garnishee defendant waived all irregularities in the issuing and service of garnishment process in the case, and that she cannot question the validity of this judgment.

The judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

WHITE *v.* HERRICK PIANO CO.

INJUNCTION—LEVY OF EXECUTION—EXECUTION LEVY.

An execution levy, after judgment, on the interest which the debtor appeared from the record to own in certain realty, being regular and valid, it was erroneous to restrain further proceedings by an injunction as to the judgment creditor, who made the levy in good faith without any notice of any defect in the title, or fraud claimed to have been practiced by the debtor in obtaining the deed.[1]

Appeal from Benzie; Chittenden, J. Submitted January 13, 1913. (Docket No. 94.) Decided September 30, 1913.

Bill by Jacob I. White and another against the Her-

[1] On the question of irregularities in execution as ground for injunction against sale under it, see note in 30 L. R. A. 136.

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rick Piano Company and others for cancellation of certain conveyances. From a decree for complainants, said Herrick Piano Company appeals. Reversed.

D. G. F. Warner, for complainants.

A. C. Hindman, for defendant Herrick Piano Co.

MCALVAY, J. The complainants, husband and wife, filed their bill of complaint to set aside certain conveyances made by them to defendants Jacob Diefenbacker and Cora Diefenbacker severally, and to set aside a certain mortgage given by Jacob Diefenbacker to defendant Elizabeth Friar, and to set aside a certain execution levy of defendant Herrick Piano Company, upon a judgment in its favor against defendant Cora Diefenbacker, and to enjoin a sale under said levy, claiming that the transfers to the Diefenbackers were procured fraudulently and that the lien of the mortgage and the levy upon the real estate were consequently void. Complainant Nancy White died after the commencement of suit, and, having no interest in the property involved except that of a wife, it was not considered necessary to revive the case as to her. Her death was, however, suggested of record.

The property involved in this case was originally purchased by complainant Jacob I. White under a contract from Maggie Barry, and when full payment was made a deed was executed by her to complainant Jacob I. White and Cora Diefenbacker July 7, 1906, and duly recorded July 18, 1906. Afterwards these parties last mentioned conveyed a half interest in this property to Jacob Diefenbacker.

Cora Diefenbacker was indebted to defendant the Herrick Piano Company, which recovered a judgment in the circuit court for Benzie county, upon which the execution issued, and the levy above mentioned

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was made by the sheriff January 24, 1908, upon her interest in the land in question. The defendant Jacob Diefenbacker made and executed a mortgage to Elizabeth Friar for $275 upon his interest in said land.

Cora Diefenbacker was the daughter of complainant White, who had been married to and divorced from a man by the name of Sutherland and who had about the time of this conveyance taken up with the defendant Diefenbacker in a desultory sort of way, claiming that a marriage had been entered into between them, and by the consent of both she was known as his wife in that community. Events proved that their relations were not marital in character; she being the victim of a misplaced confidence. The record also shows that certain contracts were made between White and one or both of the Diefenbackers in relation to this same property and concerning which, so far as the interests of the appealing defendants are concerned, it is not necessary to enter into details.

The bill of complaint was filed March 3, 1908. An injunction upon an *ex parte* application to a circuit court commissioner, in the absence of the circuit judge from his circuit, was issued March 13, 1908, against defendant Herrick Piano Company, restraining it from proceeding to sell the property upon which its execution had been levied and advertised for sale. This injunction issued without filing any bond to stay proceedings upon said execution. Later a motion was made by the Herrick Piano Company to vacate and set aside this injunction for that reason, which was denied, and complainants were required to file a bond in the sum of $500 to protect this defendant in the matter of its levy and also as security for costs in the pending suit. All of the defendants except Cora Diefenbacker severally answered the bill of complaint. Issue was joined upon the answers, and the cause was heard before the court. The court granted

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all the relief asked in the bill of complaint except as to the mortgage of Elizabeth Friar, which was held to be a good-faith mortgage and a bona fide lien upon the premises. Defendant Herrick Piano Company has appealed and asks that the determination of the court declaring the execution levy upon the interest of the defendant Cora Diefenbacker canceled and set aside be reversed.

The decree in this case is, to say the least, a peculiar document. It was made and entered without any notice to the appealing defendant. No explanation is made concerning it. It may be said that it contains language which in terms determines questions involved in this case and undertakes to finally dispose of the rights of the litigants. Apparently it has been accepted by all the parties interested, except the appealing defendant. As to the rights and interests of parties not before this court, we are not concerned.

The appealing defendant has brought the case here, claiming that upon the record, as far as its interests are concerned, the decree of the circuit court should be reversed. This appeal brings this matter before this court to be considered *de novo*. In the decree itself defendant is not properly described, but it is evident from its wording that it was intended to name it in connection with the execution levy which is canceled and set aside. It is therefore necessary to consider this record only with reference to the claims and contentions of this defendant. No question is raised in the record as to the validity of the judgment in its favor against defendant Cora Diefenbacker, upon which the execution issued.

An examination of the entire record does not show evidence of notice of any defect in the title to the interest which Cora Diefenbacker had in the property in question brought home to the defendant Herrick Piano Company or to any other person. This record shows at the time of the levy of the execution at least

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an undivided one-fourth interest in her. From the time of the execution and record of the deed from Mrs. Barry in July, 1906, until this suit was instituted on March 3, 1908, the record title of an interest in the premises in question stood in Cora Diefenbacker.

There is no testimony in the case tending to show want of good faith on the part of the defendant Herrick Piano Company or to show any irregularity in its proceedings taken under its execution levy to sell its debtor's interest in this real estate.

The injunction was improvidently issued, and the determination of the court, as far as this appealing defendant is concerned, was erroneous. The decree as to the Herrick Piano Company vacating and canceling the execution levy is reversed and set aside, with costs of both courts to be taxed in favor of this defendant and against complainant. A decree for said costs will be entered against Albert E. Knight, surety for costs; this defendant to have execution thereof against said surety. A decree will be entered in this court in accordance with this opinion.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

KEENAN *v.* CITY OF MOUNT PLEASANT.

1. APPEAL AND ERROR — BRIEF OF APPELLANT — STATEMENT OF FACTS.

The court will not undertake to perform the duty devolving on counsel for appellant to make a clear and con-

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cise statement of the errors relied upon, the questions involved, and the manner in which they are raised, as required by Supreme Court Rule 40.

2. MASTER AND SERVANT—INSTRUCTIONS TO JURY—TRIAL.
On the trial of a personal injury case, brought by an employee of the city who was hurt by the caving in of a trench which he was working in, the court covered defendant's request to charge the jury that if defendant's agent or officer instructed plaintiff's fellow-servant to watch the bank and give necessary warning, his failure to do so was the proximate cause of the injury, where the charge as given stated that if plaintiff was negligent, because he assumed an improper or unsafe position, he could not recover, that if he was warned, as defendant claimed, of the danger, or heard the fellow-servant instructed to watch the place and that it was dangerous, he would be chargeable with the duty of using great care, but if he did not hear it, the jury should not consider the testimony on that point, that if defendant's agent placed a servant to watch the bank for any warning of a cave-in and to give immediate notice to the other workmen, defendant performed its legal duty, and that defendant was only required to furnish a reasonably safe place to work.[1]

3. SAME—CONTRIBUTORY NEGLIGENCE—RISKS ASSUMED.
Upon testimony that plaintiff was assured by defendant's water commissioner, in charge of its work, that the trench was safe and that the plaintiff did not hear the instructions given a fellow-servant to warn the men of danger, the questions of assumption of risk and of contributory negligence became questions of fact for the jury.

4. MUNICIPAL CORPORATIONS—FILING CLAIM—DEFENSE—STATUTES.
Under 1 Comp. Laws, § 3081 (2 How. Stat. [2d Ed.] § 5603), requiring the filing of a claim for injuries with the council of a city, the failure to present the same is a matter of defense, which defendant must show: plaintiff's omission to prove the fact did not entitle defendant city to a verdict.

Error to Isabella; Dodds, J. Submitted January

[1] The question of the liability of a municipality for injury to servant in connection with waterworks system is treated in a note in 25 L. R. A. (N. S.) 241.

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17, 1913. (Docket No. 145.) Decided September 30, 1913.

Case by Michael Keenan against the city of Mt. Pleasant for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Francis McNamara and *H. A. Sanford,* for appellant.

Frank H. Dusenbury and *William M. Smith,* for appellee.

MCALVAY, J. This is an action for damages for personal injuries received by plaintiff while employed by defendant, under its proper officer, in laying certain water pipes in a trench, by a caving in of the side of the trench upon him. He recovered a substantial judgment upon the verdict of a jury, and the case is brought here by the defendant for review.

The defendant and appellant in its brief has not complied with the requirements of Rule 40 of this court. Its brief does not contain a clear and concise statement of the facts distinct from argument. It does not contain a statement of the errors upon which appellant relies, nor of the questions involved, nor of the manner in which they were raised. It is not the province of this court in any of these respects to perform the duties devolving upon counsel, and no attempt will be made to do so.

We find in the charge of the court a statement of the claims made by the parties upon the trial, which, for the purposes of this case, sufficiently states the facts. It is as follows:

"The plaintiff claims that at the time in question, while he was working for the city under the instructions of the street commissioner, Charles McKinnon, he was called from the work he was doing and sent into the bottom of the trench, where they were laying

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water pipe, to assist in calking the last, or the last two, of the joints of the water pipes where they came together. He claims that it was 5 or 5½ feet deep, perhaps. The plaintiff claims that, at the time, he had never been in the business of calking—except for a short time before on another street and then only for a short period of time—that when he went in there, as he says, his experience had been only about an hour altogether. He claims that the place was dangerous, and that previous to his going there that day he was assured that it was not dangerous by the water commissioner, and that he relied upon that assurance in going into the trench and in performing the labor that he was attempting to perform, and he claims that while there, and while in the performance of his duties, and without any negligence on his part, the bank from the west slipped in on him, and he was covered up and received the injuries which he has claimed here in the case occurred to him at that time. The defendant admits that the plaintiff was injured at the time and place claimed by the plaintiff. It admits that the water pipe that was being laid was about five feet below the surface, and that the dirt that had been thrown out of the trench was thrown on the west side of the trench, and that the plaintiff was sent into the trench to perform labor by the commissioner. But they also claim that Mr. Drum, one of the men working there, was left upon the bank to watch the bank at that place, and that plaintiff was warned of the danger before he went in there, and that he himself, after being warned, claimed that there was not any danger, and that while in there he assumed a position which increased the danger that there might be by reason of lying down upon the pipe, instead of having his feet kept in a position so that he could rise up in case the bank started to fall in, and that, while the bank did fall in, that if he had been in the proper position in doing his work he could have arisen to his feet and would not have been hurt, and that while there he was warned by Mr. Bemrose and Mr. Dunn—who, they claim, was upon the bank—to be careful, and by Mr. Bemrose that he should not lie down upon the pipe."

We find from defendant's brief that reliance is

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placed upon error assigned, because of the failure of the court to give its fourth request to charge, as follows:

"If you find that the water commissioner instructed Mr. Drum to watch the bank and give any necessary warning, and Mr. Drum failed to give such warning as was necessary, the negligence of Mr. Drum, as a fellow-servant, was the proximate cause of the injury, and the plaintiff cannot recover."

And charging instead:

"Now, if Mr. McKinnon, as he says, saw some of this sand fall down in the trench, and thought that then there might be danger, and placed Mr. Drum there for the purpose of watching, that was a proper thing for him to do, and if Mr. Drum neglected his duties, the city would not be liable for it, so far as that particular thing is concerned."

The foregoing excerpt from the charge, taken by itself, does not fairly represent what the court said in his charge upon this subject. The foregoing charge was continued by saying:

"But the plaintiff claims that that was not all that was necessary on the part of the city to make this a reasonably safe place. They say that it ought to have been curbed, or stayed, in some way, inasmuch as the commissioner knew that it was dangerous, and that, as a matter of fact, it was dangerous—and, of course, gentlemen, the result showed that it was dangerous. The commissioner may not have known that it was as dangerous as it was, or that there was any danger at all, and he claims there would not have been any danger if the plaintiff had obeyed the warning given him and stood upon his feet, as he ought to have stood, as they claim, in calking a joint, because they say, if a man stays on his feet and the bank starts to slip, that he may rise up and get out of the way of it, and then he will be covered only for a portion of his limbs; but, if he is lying upon his breast, they claim that he cannot get up, and consequently he will be caught in there, and he is in more danger, and they claim that the plaintiff was negli-

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gent by reason of the position that he got into, and that he is liable himself for this. Now, if the plaintiff was negligent by reason of getting into the wrong position, when he could have taken another position, then he cannot recover in this case, even though the place was a dangerous place, because no man can recover in the State of Michigan who is himself guilty of negligence that contributed to the injury that he sustained.

"But this warning that the defendant claims that they gave the plaintiff must be considered in two different phases: First, if everything was done that the defendant claims was done, then you could take that into consideration in determining whether or not the defendant was guilty of negligence; but, if the plaintiff did not hear about that, then it makes some difference in determining whether or not he was guilty of negligence. If he heard Mr. McKinnon tell Mr. Drum that that was dangerous, and to stand right there and watch it, as the defendant claims, then he was put upon his guard, and ought to have been very careful; but if he did not hear that at all, even if it was said, and you could not say that he knew it was dangerous, then you could not take that into consideration in determining whether or not he was guilty of negligence himself. I want you to understand that, gentlemen, because it has a double bearing: If McKinnon told Drum to stand there, expecting he would do it, as it was his duty to do, and he told him that, then, so far as that particular thing is concerned, that would be performance of duty on the part of the defendant. And if the plaintiff heard it, then he would have to take notice of it, and you would have to consider it in determining whether or not he was negligent. But, if he did not hear it, all the effect it would have is to show that the defendant was not negligent in that particular. But, if the plaintiff was not otherwise negligent, and if you find it was negligent of him in lying down on his breast, as some of these witnesses say, and he did do that, when a reasonably prudent man would have done otherwise, then he cannot recover. But, if McKinnon placed Drum there on the bank, with orders to watch the bank on the other side carefully and give warning,

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as McKinnon says can always be done, because, he says, the bank does always give warning, if that is true, if the bank always does give warning, and he placed Drum there with orders to watch it and give warning immediately, then McKinnon did all that the law requires of him to do in that regard, so far as giving warning is concerned.

"Now, the defendant is required by law to furnish a reasonably safe place for its employees to work. Testimony has been offered here to show that water mains have been laid for a great many years to the depth of five feet, as this one is claimed to be, and that no accident has happened during that whole time, and that it has always been done without curbing. You are to take that into consideration in determining whether or not this was a safe place for the superintendent to send an employee into to work who had the same experience that Mr. Keenan had.

"When Mr. Keenan went into the trench, if he had previously heard McKinnon assure him that it was safe, he had a right, as I told you before, to consider that in determining what his action should be in the trench. But if, notwithstanding all that, he got into an unsafe position, where he could not help himself in case of danger, and a reasonably prudent man would not have done that, and he was injured by reason of that, then he cannot recover."

So large a portion of the charge has been given that it will be readily understood that upon the matter above complained of the court fully and fairly protected the rights of defendant.

It is further claimed by defendant that the court was in error in not directing a verdict in favor of defendant, as requested, upon the grounds:

(1) That the risk was assumed by plaintiff, and was an obvious risk; (2) that there was no evidence of a statement of plaintiff's claim for injury having been filed with the city clerk, as required by law; (3) that plaintiff was guilty of contributory negligence.

The first and third propositions were disputed questions of fact, which were properly submitted to the jury, and found against defendant's contention. It

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appears, without dispute, that plaintiff was not a man acquainted with the work which he was ordered to perform in the trench in calking the pipes, and there was evidence tending to show that he was assured by the commissioner of the safety of the place, as well as evidence that he did not hear the commissioner order the man Drum to warn the workmen.

With reference to the second proposition relative to filing his claim with the clerk, no defense in the case was claimed or presented based upon the plaintiff's neglect in that regard. The question was first raised upon the above motion.

The record shows that upon a motion for a new trial, based upon these same objections, it appeared, from the showing by plaintiff, that within the time provided by law he had fulfilled all the requirements of the statute in regard to filing his claim with the city clerk, which fact the court finds was not disputed. From this it is clear that defendant knew plaintiff had complied with the law, and bases his contention upon the claim that it must be shown affirmatively by plaintiff.

The statute invoked by defendant, which is section 3081, 1 Comp. Laws (2 How. Stat. [2d Ed.] § 5603), reads:

"It shall be a sufficient defense in any court, to any action or proceeding for the collection of any demand or claim against the city for personal injuries or otherwise, that it has never been presented * * * to the council for allowance."

The fact that a claim has not been presented for allowance is made by the statute a matter of defense. This statute does not provide that the omission to present any claim shall be a bar to an action against the city therefor, as is sometimes provided by charter, but distinctly states that it shall be "a sufficient defense in any court." The court was therefore not in error in refusing to direct a verdict for defendant.

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The denial of the motion for a new trial is not seriously discussed by appellant. An examination of the reasons upon which it is founded satisfies us that the disposition made of the motion by the court was correct. The record shows that plaintiff was seriously injured; that the case was carefully submitted by the trial court to the jury, and that the verdict of the jury cannot be considered excessive, but was supported by the evidence in the case.

The judgment of the circuit court is affirmed.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

O'NEILL *v.* ANCIENT ORDER OF GLEANERS.

1. INSURANCE—FRAUD OR OPPRESSION—MUTUAL BENEFIT POLICY—EVIDENCE—REMEDY WITHIN ORDER.

   Where the beneficiary, in a mutual benefit policy, filed her petition for a hearing on her claim, which was granted by the society issuing the policy, and at the hearing her attorney submitted no proofs relative to the age of decedent, which the insurer had questioned, but submitted merely an offer of compromise which the insuring body rejected, and it appeared that the attorney for the beneficiary had made no attempt to push the settlement of the controversy after receiving notice that the claim would be considered, and that he filed no complaint relative to its failure to act, but suffered the matter to stand nearly two years after the filing of the petition, when he wrote requesting defendant order to fix a date for hearing, presenting no proofs, as requested by the order at that time, and taking no appeal from

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the final rejection of the claim, no sufficient excuse on the ground of fraudulent or oppressive action was made out and the defense, available under plaintiff's policy that the remedies within the order had not been exhausted, was conclusive against the claim.

2. SAME.

And where the administrator of such beneficiary took no steps after her death to obtain a hearing before the supreme council of the order, he was not entitled to resort to the courts.

Error to St. Clair; Tappan, J. Submitted January 27, 1913. (Docket No. 1.) Decided September 30, 1913. Rehearing denied January 5, 1914.

Assumpsit by Larry E. O'Neill, administrator of the estate of Julia Breen, deceased, against the Ancient Order of Gleaners upon a benefit certificate. Judgment for plaintiff. Defendant brings error. Reversed; new trial refused.

Charles S. Hampton and *James A. Muir*, for appellant.

C. L. Benedict and *William R. Walsh*, for appellee.

MCALVAY, J. This is an action brought by the representative of Julia Breen, deceased, who was named as beneficiary in a certain benefit certificate for $1,000 issued by the defendant order to her husband, Maurice Breen, at the time he became a member of said order, and dated June 11, 1900. The trial resulted in a judgment for the amount claimed due. Defendant has removed the case to this court for review.

The following are the material facts in the case: Maurice Breen, a farmer living in St. Clair county, Mich., on May 14, 1900, made the usual application in writing for membership in defendant order, among other things stating and warranting, in answer to

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questions in said application, that his birthday was July 24, 1850, and also that any untrue or fraudulent answer "in regard to my * * * age, * * * or neglect to pay assessments, * * * shall vitiate my benefit certificate and forfeit all payments made thereon."

The foregoing benefit certificate was issued to him upon this application in the amount of $1,000, payable to his wife, Julia Breen, in case of his death while a member in good standing, and a further agreement to loan the member $20 per month under certain conditions in case of disability. The laws of this order provided that no person above the age of 50 years could become a member.

In October, 1904, upon the occasion of a visit to the local arbor at Emmett, Mich., of which Maurice Breen was a member, by the chairman of the supreme council of the governing body of the order, the question was brought up regarding the age of Maurice Breen and his right to membership. Inquiry was made by this officer of defendant upon this subject and an investigation was started. Maurice Breen was notified by a letter from the supreme secretary of the order to furnish evidence to substantiate his application as to his age, as follows:

"October 28, 1904.

"MAURICE BREEN,
"Emmett, Michigan.

"Companion:

"I am directed by the supreme council to inform you that it will be necessary for you to forward to this office information in the shape of an affidavit or signed statement from those who can furnish such evidence that will substantiate the statement regarding your age as given in your application for membership in this organization. You will understand that in case of your death, absolute information as to the date of your birth must be had, and if an error is found, of course your certificate is invalidated, therefore for your protection, you should see that this

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affidavit is furnished at once. Kindly give this matter your prompt attention as evidence should be in my hands before the next meeting of the supreme council. Fraternally yours,

"G. H. SLOCUM."

He neglected to do anything in regard to the matter and the local secretary was instructed by the supreme council not to receive any further dues or assessments from him. He received this notice in May, 1905, and continued to tender his dues after that date. He died December 26, 1905.

In August, 1906, the beneficiary, Julia Breen, filed her petition with the defendant order for a hearing of her claim under such beneficiary certificate. Before this time she had requested blanks to fill out formal proofs of death and on July 13, 1906, received a communication from the supreme secretary, refusing to furnish such blanks on the ground that Maurice Breen was not a member in good standing at the time of his death. A hearing was granted on this claim September 11, 1908, at which the attorney for Julia Breen was present. He offered and submitted no proofs to sustain the claim but submitted for consideration a proposition for settlement, which was not accepted. Defendant claims that all of the proofs in its possession relative to the age of Maurice Breen at the time he became a member were communicated to this attorney. Julia Breen was not then living, having died April 4, 1908. Letters of administration of the estate of Julia Breen were granted plaintiff August 26, 1910. The declaration in this case was filed September 10, 1910. The facts relative to this matter which occurred between September 11, 1908, and the commencement of this suit which are shown by the record will, as far as may be necessary, be stated in connection with the discussion upon that proposition.

There are several very important questions raised

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by the appellant upon the errors assigned. The principal contention of appellant in this case is that plaintiff did not exhaust his remedy in the forum established by defendant order in its constitution as required of its members, and that no action can be maintained in the courts unless the claimant has been fraudulently deprived of his rights under the laws of the order. The facts established by the record relative to the matter of the petition of Julia Breen have already been stated. The petition was accompanied by a letter dated August 20, 1906, which inclosed the petition and asked for notice, when the matter would come up for hearing.

On August 23d defendant acknowledged receipt of the petition and letter of August 20th, stating that the meeting would probably occur in September or October and that notice would be given. With the exception of a letter inquiring about the date of a hearing written according to its date in the record in August, 1906, the claimant took no further steps in the matter until September 20, 1907, more than a year later, when her attorney wrote the attorney of defendant order relative to the claim, saying that he would like to take it up and get a settlement and asked when they would have a meeting. After that date and before the date fixed for hearing, several letters passed between the attorneys of the parties of like import, relative to the time a date of hearing would be fixed.

As already stated in the recital of facts, the meeting of the supreme council was held September 11, 1908, at which time claimant's attorney was in attendance. He put in no proof but submitted a proposition of settlement and left the meeting. The minutes of this meeting show that he claimed to appear "for the representatives of both said member and said beneficiary, both deceased." After the meeting the attorney for Julia Breen wrote two letters, on

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December 8, 1908, and January 26, 1909, to the attorney for defendant order, asking for information, and on January 26th he also wrote a letter to the general secretary of the order. This letter was answered February 3, 1909, as follows:

"DETROIT, MICHIGAN, Feb. 3, 1909.

"JOSEPH WALSH, Attorney,

"Port Huron, Michigan.

"*Dear Sir:* Your favor of recent date at hand and in reply will say that I have intended to write you in regard to the Breen case, and think I promised Mr. Wixon that I would do so but the matter entirely escaped my attention.

"At a meeting of the supreme council held after Mr. Wixon consulted you, I found that the members of the supreme council were divided as to the instructions given Mr. Wixon. There were only two members of the supreme council present at that meeting, and at the last meeting held on the 21st there was a full board present and the matter was again brought up for consideration. All members of the board agreed that Mr. Wixon was instructed to talk with you with reference to this matter and find out just what position you were going to take with reference to this case, and he was to make his report to me. Mr. Wixon, on the other hand, understood that he was to consult with you with reference to an adjustment of the case.

"Now, Mr. Walsh, I can assure you that we are anxious to do what is right in connection with all cases of this kind, but personally I feel that this ought to properly come before the delegates at the biennial meeting and not be adjusted by the board. We were perfectly sincere in our efforts to get Mr. Breen, during his lifetime, to furnish us evidence as to his age, and having taken action that we considered fair and legitimate, it does seem wrong for us to now when both the member and his beneficiary are dead and gone, to adjust this matter and thereby acknowledge that we did wrong while this member was alive. I am sure that the board would be willing to allow you to present the matter to the delegates at the coming biennial meeting, and I would suggest that you pre-

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sent the matter to them asking them to take this up, first presenting it to the supreme council and then asking to come before the delegates at a biennial meeting assembled. However, should you like to appear before the board and present this matter again when you have plenty of time, and go thoroughly over the matter, I should be glad to advise you of the date of their meeting. You will remember that when you were here there was a ball game on and neither yourself nor Mr. Wixon had time to go thoroughly into the details of the case.

"Awaiting your further desires in regard to this case, I am, Fraternally,

"G. H. SLOCUM."

There is further correspondence claimed to have been carried on between the two attorneys, but the letter of February 3, 1909, from the general secretary was never answered.

On June 16, 1910, the attorney who represented Mrs. Breen during her lifetime wrote the following letter to defendant order:

"PORT HURON, MICH., June 16, 1910.

"ANCIENT ORDER OF GLEANERS,
"Gleaner Temple, Woodward Ave.,
"Detroit, Mich.

"*Gentlemen:*

"It is quite a long while since I submitted the claim of Breen against the Gleaners to your committee for their consideration, and although I have written your Mr. Slocum and other officers of your organization, I have been unable to find what action you have taken upon the matter. Will you kindly advise me what you intend to do? Yours truly,

"JOSEPH WALSH."

Which was answered by the general secretary as follows:

"DETROIT, MICH.,
"July 1, 1910.

"JOSEPH WALSH,
"Port Huron, Mich.

"*Dear Sir:*

"Your favor was received at the office during my

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absence and has just been presented to me for my consideration. Attorney Wixon, at Caro, certainly must have informed you of the action of the supreme council with reference to the so-called Breen claim. He was informed that the supreme council did not feel that they should assume any liability under this claim, and they refused to settle for $250.00, the amount agreed upon between yourself and Mr. Wixon.

"I would suggest that you write direct to him for any further information you may desire.

"Sincerely yours,

"G. H. SLOCUM."

From the history of this correspondence and the letters themselves which have been given at as great length as the necessities of the case required, must be established the contention of plaintiff that he has been deprived of a hearing on this claim by fraud and oppression practiced on the part of the officers and agents of defendant order.

The petition of Julia Breen was filed August 20, 1906. Its receipt was promptly acknowledged by letter to her attorney, stating why a meeting could not be held until September or October following. With the exception of one letter written soon after the petition was filed, no effort was made on her part or by her attorney to prosecute this claim until one year and one month later, to wit, September 20, 1907. Between the last-mentioned date and the date of her death, which occurred April 4, 1908, but two letters were written by her attorney to the attorney of the order making inquiry relative to a hearing upon this claim, in neither of which is any complaint made because of delay, and in one it appeared that the delay had been caused by this attorney for the purpose of accommodating his friend, the attorney of the order, because he had an election on his hands. We do not find in this correspondence, from the time of filing the petition until the death of claimant, anything whatever to indicate an unwarranted delay caused by de-

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fendant or that fraud and oppression were contemplated or practiced by it against Julia Breen. After her death up to the time of the meeting of September 11, 1908, but one letter was written by Mrs. Breen's attorney to the general secretary of defendant requesting that a date be fixed for the hearing "in the matter of *Breen* v. *Gleaners*." This was dated July 16, 1908 (more than three months after her death), and was answered July 24, 1908, to the effect that the date of the meeting when fixed would be given him by the attorney, and on August 3d following the attorney wrote that such meeting would be held soon in Detroit and the exact date would be given.

The meeting called to hear this claim was held September 11, 1908. As far as the record shows, the death of Julia Breen was first made known to defendant order at this meeting when the attorney who ha always represented her in the matter of her clair stated that he appeared "for the representatives of both said member and said beneficiary, both deceased." This is the meeting of which plaintiff in this suit complains and charges that no proofs were introduced on the part of defendant. The attorney, who had charge of the claim from the time of filing the petition and under whose supervision it had been prepared, knew, as stated in the petition, the reason the defendant order refused to pay the claim, and also that during the lifetime of Maurice Breen, after the order had requested him to furnish proofs of his age, his standing in the order was questioned. He had been consulted about the matter, and as a witness in the instant case testified:

"I knew they attempted to suspend him because he did not furnish the proof of his age.

"*Q.* Do you know of any attempt on the part of Maurice Breen during his lifetime to be reinstated into the order?

"*A.* Why, no, there was no such attempt. I ad-

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vised him that he didn't have to be, and that they didn't have any authority to put him out at all."

The following is article 5, § 1, subd. 15, of the constitution of the order:

"(15) The supreme council shall have power to pass upon all death and permanent disability claims, and if in their judgment any such claim is not on its face a valid one, they shall notify the beneficiary or beneficiaries of the deceased member thereof in case of death claim, and the insured member thereof in case of permanent disability loans, and give them or their attorney an opportunity to appear before the supreme council within sixty days thereafter and present such evidence as they may have, to establish the justice of said claim, and the supreme council shall try, hear and decide upon the justness or validity of such claim, and such decision shall be binding and conclusive upon said claimant unless an appeal is taken to the biennial meeting of the supreme arbor. The notice of the appeal from the decision of the supreme council must be filed with the supreme secretary within sixty days thereafter. The decision of the biennial meeting shall in all cases be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary against the supreme arbor."

Under defendant's constitution such hearings were held for the purpose of giving claimants an opportunity to present such evidence as they might have to establish the justice of their claims. At this hearing this attorney submitted no proofs, as he testified:

"*Q.* You didn't furnish any proof whatever to the order when the order requested it with reference to the age of Maurice Breen?

"*A.* Nothing at all. I didn't deem it at all necessary that we should furnish them any proof."

He only made an offer for settlement and left the meeting. This offer of settlement was not accepted. It is apparent from the record that the supreme council held this meeting under subdivision 15 of the constitution, *supra*, and it is also apparent that claimant

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made no attempt to establish her claim. Plaintiff in his declaration charges that afterwards, without notice to Julia Breen, or plaintiff, or his attorney, the supreme council met and rejected the entire claim fraudulently and oppressively and without evidence.

After September 11, 1908, letters passed between the parties. The attorney for Julia Breen wrote two letters to the attorney and one to the general secretary of the order asking for information, which the secretary answered February 3, 1909. This last letter is already given at length, upon reading which we conclude that it contains no evidence of a desire to deprive the attorney of a hearing or to defraud and oppress the claimant. On the contrary, it will bear no such construction. No reply was ever received to this letter, although it called for a reply. Later correspondence before the commencement of this suit does not require consideration as it is not important and has no bearing upon the immediate proposition under consideration.

Our conclusion from all of the evidence in the case upon the question we are considering is that Julia Breen was not by fraud and oppression deprived of her right to be heard upon her claim as beneficiary of Maurice Breen, and that she had not exhausted her remedy in the forum of the order, and that neither during her lifetime nor afterwards is there any evidence of the practice of any fraud or oppression in this matter on the part of defendant order. The facts have been presented and discussed which occurred after the death of Julia Breen for the purpose only as bearing upon the conduct of defendant and its officers charged to have been fraudulent and oppressive in dealing with Julia Breen.

As far as the plaintiff in the instant case is concerned, his right and authority to represent the estate of Julia Breen was created after all the occurrences already recited. Letters of administration were not

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issued to him until August 26, 1910. The record is barren of any evidence showing or tending to show that he, or any one in his behalf, has applied to defendant order or taken any steps or proceedings whatever looking toward a hearing before its supreme council, the body authorized to hear, determine, and allow for him, as the representative of the estate of Julia Breen, beneficiary, deceased, this claim against the defendant order, arising upon the certificate issued to Maurice Breen. He must therefore be held not to be entitled to resort to the law courts, on his own showing, not having availed himself of or exhausted his remedy provided by the order.

The circuit court was in error in not granting the motion made on the part of defendant and appellant to direct a verdict in its favor upon that ground.

The judgment of the circuit court is reversed and set aside, and no new trial will be granted.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

STATE SECURITY & REALTY CO. v. SHAFFER.

SPECIFIC PERFORMANCE—EQUITY—VALUE.

Specific enforcement, being a discretionary remedy, will not be granted to compel an exchange of real property, where complainant's property was shown to be of little, if any, value, above an incumbrance outstanding against it, although it had been represented to defendants as worth from $7,000 to $10,000 more than the debt secured; and where defendants' property was worth $10,000 or upwards.

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Appeal from Gratiot; Searl, J. Submitted January 30, 1913. (Docket No. 73.) Decided September 30, 1913.

Bill by the State Security & Realty Company against John R. Shaffer and another for specific performance of a contract to exchange real property. From a decree for defendants, complainant appeals. Affirmed.

George A. Safford and *Ralph B. Wilkinson* (*George P. Stone*, of counsel), for complainant.

Thomas A. Conlon and *O. G. Tuttle*, for defendants.

MCALVAY, J. The bill of complaint in this cause is filed to enforce specific performance of the following contract:

"DETROIT, MICHIGAN, April 15, 1910.
"STATE SECURITY AND REALTY COMPANY,
"814 Majestic Bldg.,
"Detroit, Michigan.
"*Gentlemen:*

"We herewith submit the following proposition:

"For and in consideration of the covenants hereinafter mentioned, we agree to turn over to you by bill of sale and a good and sufficient deed, free from all incumbrances, the following property, to wit:

"Stock of merchandise, consisting of dry goods, clothing, furnishings, notions, boots and shoes, hardware, agricultural implements, harnesses and collars, stationery, confectionery, crockery, drugs, paints, oils, sundries, etc., etc., invoicing at about $5,000, contained in what is known as the store building and all other outlying buildings hereinafter mentioned, or upon the premises belonging to us in the village of Elm Hall, Sumner township, Gratiot county, Michigan, or any other place or places where said stock may happen to be stored.

"Also the real estate with appurtenances [thereunto] belonging or in any wise pertaining known as the store building (two stories and basement), wing (one story and basement), barn (two stories), and

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what is known as the Grove House (two stories) with wing (one story), and what is known as the Ironsides House (two stories) with new barn, also what is known as the Hill House (two stories), also what is known as the Gill barn (two stories), and the wing (one story), and what is known as the Red Shed (two stories), the granary and corn crib (two stories), the Strayer barn, and what is known as the Blair Shed, together with all lands fenced or otherwise belonging to any of said property, for which we are to receive from you in payment thereof by good and sufficient deed the following property situated on the northwest corner of Piquette and St. Antoine streets in the city of Detroit, Wayne county, Michigan, and more particularly described as the south ninety-three (93) feet in depth of lot five (5), and the south ninety-three (93) feet in depth of the east thirty-five (35) feet of lot four (4), being eighty (80) feet on Piquette by ninety-three (93) feet on St. Antoine street, of Emily Campau's subdivision of section thirty-one (31), upon which incumbrances exist to the amount of $10,000.

"In further consideration for which we agree to pay as follows:

"Twelve hundred dollars ($1,200) cash when the documents are passed between us closing the deal, which shall be within thirty days or as much earlier as the necessary papers can be executed, we to assume a mortgage for an amount which it will be necessary for you to make on which to raise money to retire any part of the present incumbrance of $10,000, and to execute a mortgage to you for an amount equal to the difference between the $15,000 due you in settlement (after the cash payment of $1,200 before mentioned), and the mortgage which you execute on said property.

"The terms of the above mortgage or mortgages shall be such that we will pay $1,000 six months from the closing of this transaction and interest on the full amount of $15,000 at six per cent., and $500 every six months thereafter, with interest on all sums remaining unpaid at the rate of six per cent. The full amount to become due five years from date. We to have the privilege of paying as much in excess of the

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above payments at any interest date as we may so desire to do, or if you choose to give us a warranty deed, we will execute a mortgage to you for the sum of $15,000 on the same terms as above.

"Both parties to furnish abstracts showing clear title to all properties mentioned herein with the exception of the incumbrances already existing, and to be made as herein stated.

"We also agree to operate the store until such time as you can place someone in charge of the property making returns of all sales and caring for the business and property the same as if we were still the owners of the same, for which we shall receive a reasonable compensation, the property to remain under our care not longer than thirty days.

[Signed] "JOHN R. SHAFFER,
[Signed] "TILLIE A. SHAFFER

"Accepted this 9th day of May, 1910.

"STATE SECURITY & REALTY CO.
[Signed] "F. E. BUSHMAN,
"President."

The defendant John R. Shaffer, a physician, had resided at the village of Elm Hall for 35 years. Desiring to exchange his property there for Detroit property, he listed his holdings with William E. Landers, of Detroit, as a real estate agent. Landers, who was manager of an insurance agency, had turned over his real estate business to Arthur D. Brooks under an agreement that all commissions should be equally divided. Brooks brought defendants' property to the notice of Franklin E. Bushman, who is president of the complainant company. A trade had been made between defendant John R. Shaffer and Bushman, in which one of Shaffer's farms was disposed of to Bushman. During the negotiations involved in this trade, Bushman went to Elm Hall and became acquainted with defendants' property. Later Bushman, through Brooks, offered different trades to defendants for this property and finally on April 15, 1910, suggested a trade for the Piquette avenue property. The terms were discussed and Shaffer returned to his home,

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having instructed Bushman to draw up a proposition. The contract in question was drawn by Bushman in duplicate or triplicate and all copies handed by him to Brooks, who forwarded them to defendants at Elm Hall. The proposition was at once executed by the two defendants and returned to Brooks, who in turn handed one of the copies to Bushman. No notice of acceptance (in express terms) was given to the defendants by Bushman, Landers, or Brooks, but on May 9th Brooks wrote defendants that the abstracts were ready and that they should come in as soon as convenient. Accordingly they went to Detroit on May 13th, with the expectation that the deal would be closed. Bushman had arranged for a mortgage for $15,000 upon the property with one Barnard. This mortgage was to be executed by the defendants and was by them so executed on the afternoon of the 13th; it being expected that the papers would be passed the following day. In the meantime some irregularities had been discovered in the abstract of the Piquette avenue property by defendants' attorney, and complainant's attorney discovered some omissions in the deed which defendants had executed. On the evening of the 13th and the morning of the 14th defendants visited the Piquette avenue property, made some inquiries as to the value, and concluded it was worth much less than the sum of $28,000, the price at which they had proposed to trade for it. Defendant John R. Shaffer went to complainant's office, repossessed himself of his abstract, and walked out. A deed was tendered to him by complainant which he refused. Brooks had an arrangement with Bushman, by the terms of which he was to receive 1½ per cent. from Bushman if the deal went through. Landers' agreement with defendants was for 2 per cent. commission. Defendants had no knowledge that Brooks, who was associated with their agent, was being paid a commission by Bushman, one-half of

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which was to go to Landers. It would seem from the record that neither Landers nor Brooks had any authority to act for or bind the defendants. At the time the negotiations were in progress, there were two mortgages upon the Piquette avenue property, one for $6,000 to the Dime Savings Bank, and a second one which was in process of foreclosure. In order to secure a loan of $15,000 on the property, Bushman agreed to pay a commission of $1,500. He likewise agreed to give a mortgage as further security upon some 16 vacant lots valued by him at $300 each, as well as to sign the $15,000 note himself and secure the signatures of his wife and one or two associates. Witnesses for complainant estimated the value of the Piquette avenue property at from $22,000 to $25,000.

On behalf of defendant some seven witnesses were sworn as to value. The value of complainant's property as given by these witnesses (and they seem to be reasonably competent and reliable) varies from $12,400 to $16,700; the average being about $15,000. Defendants valued their Elm Hall property at $11,800. Complainant contends that this valuation is grossly exaggerated. The court below dismissed complainant's bill, and it has appealed.

In support of the decree defendants contend that the contract cannot be enforced because of lack of mutuality. *Hollingshead* v. *Morris*, 172 Mich. 126 (137 N. W. 527, 41 L. R. A. [N. S.] 310), and cases cited. We find it unnecessary to consider this phase of the case for the reason that we have concluded that the contract in question is one which should not be enforced in equity. Assuming the valuation of complainant's property given by defendants' witnesses to be correct, it is apparent that the mortgage for $15,000, subject to which defendants were to take it, represented practically the entire value. The fact that complainant agreed to pay a commission of $1,500 upon a $15,000 loan and was obliged to give

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other security as well is to our minds rather convincing proof that the Piquette avenue property was not worth much more than that sum. So that, if the contract is specifically enforced, defendants would be compelled to transfer their property (be it worth little or much) to complainant practically for nothing.

Specific performance is not a remedy of right but is within the legal discretion of the court. *Chambers* v. *Livermore*, 15 Mich. 381; *Chapman* v. *Morgan*, 55 Mich. 124 (20 N. W. 820); *Cox* v. *Raider*, 138 Mich. 249 (101 N. W. 531). And will be refused where it is inequitable to grant it. *Rust* v. *Conrad*, 47 Mich. 449 (11 N. W. 265, 41 Am. Rep. 720); *Rathbone* v. *Groh*, 137 Mich. 373 (100 N. W. 588). See, also, 26 Am. & Eng. Enc. Law (2d Ed.), pp. 67, 68.

The decree of the court below is affirmed, with costs.

STEERE, C. J., and MOORE, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

KING *v.* GRAND RAPIDS RAILWAY CO.

1. STREET RAILWAYS — CONTRIBUTORY NEGLIGENCE — SUBSEQUENT NEGLIGENCE—LAST CLEAR CHANCE.

   The doctrine of subsequent or discovered negligence is applicable to an action for personal injuries sustained by plaintiff who stopped his automobile on defendant's street car tracks to permit a third person to get in, remaining about half a minute in that situation after looking for a car and seeing none approaching, the engine of the automobile running and the car coming up without giving a signal, striking the machine as plaintiff was

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trying to clear the track, the evidence showing that the motorman had a clear view of the track for 340 feet. STEERE, C. J., and MOORE and BROOKE, JJ., dissenting.

2. SAME—TRESPASSERS—NEGLIGENCE.

Plaintiff was in no sense a trespasser, and if the motorman, after discovering that plaintiff was on the track, failed to take reasonable precautions to avoid injuring him, the precedent negligence of plaintiff was no defense.[1]

Error to the superior court of Grand Rapids; McDonald, J., presiding. Submitted January 13, 1913. (Docket No. 93.) Decided September 30, 1913.

Case by George W. King against the Grand Rapids Railway Company for personal injuries. Judgment for defendant, on a verdict directed by the court. Plaintiff brings error. Reversed.

Lombard, Hext & Washburn, for appellant.

Kleinhans & Knappen (M. L. Dunham, of counsel), for appellee.

MOORE, J. *(dissenting)*. From a directed verdict in favor of the defendant, this case is brought here by writ of error.

Hall street in the city of Grand Rapids runs east and west. It is intersected by Madison avenue running north and south. The plaintiff is a physician and had an office on the west side of Madison avenue about five doors north of Hall street. On the north side of Hall street, a short distance east of Madison avenue, is a garage in which plaintiff kept his automobile. The defendant company has a double track in Hall street upon which it ran its cars. The street was practically level east of the garage for a distance of about 340 feet, after which there was a hill to Union street, where the car line turned south. A per-

[1] On the question of the duty of operator of automobile when near street cars, see note in 38 L. R. A. (N. S.) 493.

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son upon the street car track in front of the garage had an unobstructed view to the east for at least 340 feet, and of course the motorman of a street car had a like unobstructed view of the track to the west.

On the 2d day of June, 1911, the plaintiff with a young man went to the garage for the purpose of obtaining his automobile. The plaintiff drove his automobile out of the garage into the street with his machine headed slightly toward the east, as he was expecting to go in that direction. Upon reaching the street he looked in both directions and there was no street car in sight. He thereupon stopped the car upon the west track and turned about, watched the young man close the door to the garage, and waited for him to come to the machine. He left the engine running during this time. This occupied approximately one-half minute. Just as the young man got into the automobile, the plaintiff discovered a street car coming at what he says was a high rate of speed. He immediately attempted to get clear of the track. His machine responded but not in time to escape being struck. As the result of this collision, the automobile was crushed and the plaintiff injured. This occurred in broad daylight.

Upon the trial of the cause, after the testimony offered in behalf of the plaintiff was in, defendant swearing no witnesses, the trial judge directed a verdict of no cause of action upon two grounds:

First. That the plaintiff was guilty of contributory negligence as a matter of law in stopping his car upon the street car track and remaining there during the time mentioned.

Second. That the principle of subsequent or discovered negligence would not apply because the plaintiff was guilty of concurrent and continuous negligence.

The only question is: Did the court err in directing a verdict? Counsel discuss two propositions:

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"(1) That the plaintiff was not guilty of contributory negligence as a matter of law.

"(2) If he was guilty of contributory negligence as a matter of law, yet the defendant was guilty of subsequent and discovered negligence."

We will discuss these two propositions in the order named. Under the first head counsel say:

"There is no rule of law requiring one to give a street car an absolute right of way. We concede that it would have been his duty to get off the track as soon as he could consistently, after discovering the approach of the car, and the evidence here shows that he made every effort to get away as soon as he knew of the presence of the car. Upon this question we call the court's attention to the following cases where it seems to us the propositions we have stated are fully sustained: *Rascher* v. *Railway Co.*, 90 Mich. 413, 415 [51 N. W. 463, 30 Am. St. Rep. 447]; *Laethem* v. *Railway Co.*, 100 Mich. 297 [58 N. W. 996]; *Manor* v. *Railway Co.*, 118 Mich. 1 [76 N. W. 139]; *Quirk* v. *Railway*, 130 Mich. 654, 656 [90 N. W. 673]; *Ablard* v. *Railway*, 139 Mich. 248 [102 N. W. 741]. These cases hold that street railway companies do not possess the exclusive right to that portion of the highway covered by their tracks, but that the ordinary traveler upon the highway has the right to use every portion of the highway, including the strips between the rails. And he is only required to yield this right when his presence upon the track will unnecessarily blockade or delay the passage of cars."

A reference to these cases undoubtedly discloses the rule to be that street cars do not have an exclusive right to the street, but none of them suggest that, where one knows, as did the plaintiff, that a street car might appear at any time having the right to run under the ordinance at the rate of 15 miles an hour, he might without negligence stop his automobile on the street railway track in the middle of the block without any reason for doing so and remain with his head turned so he could not see an approaching car for a half minute or more. We think it may

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be said this was not the act of a reasonably prudent man. See *Lyons* v. *Railway Co.*, 115 Mich. 114 (73 N. W. 139); *Merritt* v. *Foote*, 128 Mich. 367 (87 N. W 262), and the many cases cited therein; *Cardinal* v. *Railway Co.*, 165 Mich. 155 (130 N. W. 627); *Stevenson* v. *Railway*, 167 Mich. 45 (132 N. W. 451).

2. Was the motorman shown to be guilty of subsequent or discovered negligence? It already appears that no witnesses were sworn for defendant. There is nothing in the testimony to indicate that the motorman had reason to suppose the machine was stalled upon the track and that it would not at once move away. There is nothing to show that, after the motorman discovered that plaintiff would not drive off the track in time to avoid a collision, the motorman failed to do what he could to avoid an accident. Can it be said that negligence on the part of the motorman, if there was negligence, to discover that the plaintiff was in danger is the equivalent of discovered danger?

In *Fritz* v. *Railway Co.*, 105 Mich. 50 (62 N. W. 1007), Mr. Justice MONTGOMERY, speaking for the court, said among other things:

"But it is said that there was testimony from which the jury might have inferred that the plaintiff's position was discovered in time to enable the defendant to avoid the collision. It is a rule recognized by repeated decisions of this court, and maintained by text-writers, that the fact of a precedent negligence of plaintiff, resulting in producing a situation or a condition known to defendant, who, after the discovery of such condition, may, by the exercise of care, avoid injury, is not a contributory cause to an injury thereafter produced by the disregard of this discovered condition. One of the earliest cases to lay down this rule is *Davies* v. *Mann*, 10 Mees. & W. 546. This rule is well stated in Bish. Non-cont. Law, § 466:

"'It is sometimes very correctly said that, if one discovers another to have been negligent, he must take precautions accordingly, omitting which he is liable to the other for the damages which follow from his own want of care, for, how-

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ever nearly related two separate negligences may be, the one cannot bar an action for the other unless it is contributory, and, though an unseen position might contribute to an accident, a discovered one cannot.'"

In *Drown* v. *Traction Co.*, 76 Ohio St. 234 (81 N. E. 326, 10 L. R. A. [N. S.] 421, 118 Am. St. Rep. 844), the court said in part:

"The doctrine of the 'last chance' has been clearly defined by a well-known text-writer as follows:

"'Although a person comes upon the track negligently, yet if the servants of the railway company, *after they see* his danger, can avoid injuring him, they are bound to do so.' * * * 2 Thompson, Negligence § 1629.

"* * * Now, it must be apparent, upon even a slight analysis of this rule that it can be applied only in cases where the negligence of the defendant is proximate and that of the plaintiff remote; for if the plaintiff and the defendant both be negligent and the negligence of both be concurrent and directly contributing to produce the accident, then the case is one of contributory negligence pure and simple. But if the plaintiff's negligence merely put him in the place of danger and stopped there, not actively continuing until the moment of the accident, and the defendant either knew of his danger, or by the exercise of such diligence as the law imposes on him would have known it, then, if the plaintiff's negligence did not concurrently combine with defendant's negligence to produce the injury, the defendant's negligence is the proximate cause of the injury and that of the plaintiff is a remote cause. This is all there is of the so-called doctrine of 'the last clear chance.' * * *

"It is clear, then, that the last chance rule should not be given as a hit or miss rule in every case involving negligence. It should be given with discrimination. * * * But further, there is testimony tending to prove that the plaintiff's team was driven upon the street railway track in the nighttime, ahead of the car, and that it continued on the track for a distance of 250 feet until struck by the car, without taking any precaution to avoid accident. Assuming that the defendant was negligent in not seeing the buggy on the track and in not avoiding the accident, yet the plain-

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tiff's negligence was continuous and was concurrent at the very moment of the collision. It proximately contributed to the collision, for without it the collision would not have occurred. There was no new act of negligence by the defendant which was independent of the concurrent negligence and which made the latter remote. Therefore there was no place in the case for the doctrine of 'the last clear chance.'

"There is a case, which was decided in the sixth circuit, which will illustrate our views, and a reference to it may save some further discussion. It is the case of *Lake Shore, etc., R. Co.* v. *Callahan,* 2 Ohio Cir. Ct. R. (N. S.) 326; s. c., 15 O. C. D. 115. A railroad section man, in obedience to an order by his foreman, started to walk along the track with his back to a locomotive 200 or 300 feet away, but without observing whether the engine was standing still or running backward, and he walked along the track for 75 feet without paying any further attention to the engine, which was in fact backing toward him, and was struck by it and injured. The court held that it was a case of concurrent negligence, continuing to the moment of the injury, that the doctrine of 'the last chance' did not apply, and that plaintiff was guilty of contributory negligence."

In *O'Brien* v. *McGlinchy,* 68 Me. 552, the court said in part:

"Generally, it is a defense to an action of tort that the plaintiff's negligence contributed to produce the injury. But in cases falling within the foregoing description, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant. This rule applies usually in cases where the plaintiff or his property is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent an injury. * * * But this principle would not govern where both parties are contemporaneously and actively in fault, and by their

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mutual carelessness an injury ensues to one or both of them."

See *Fort Worth, etc., R. Co.* v. *Shetter*, 94 Tex. 196 (59 S. W. 533); 2 Nellis on Street Railways (2d Ed.), § 462; *Bennichsen* v. *Railway Co.*, 149 Cal. 18 (84 Pac. 420).

In the instant case the plaintiff stopped in the middlle of the block upon a street railway track where a car running at the rate of 15 miles an hour might be expected at any moment, with the engines of his car running so that in a second of time he might have reached a place of safety, and remained in that position, with his head turned so that he did not see the approaching car until it was too late. The original act of negligence was continued until the catastrophe happened.

Judgment is affirmed.

STEERE, C. J., and BROOKE, J., concurred with MOORE, J.

KUHN, J. I cannot agree with the conclusion reached by my Brother MOORE that the doctrine of subsequent or discovered negligence does not apply in this case. While no witnesses were sworn for the defendant, it appears from this record that at the place where the collision occurred the track of the defendant company was straight and there was no difficulty for the motorman to see at least a distance of 340 feet. It also appears from the testimony of the plaintiff that no warning was given by the motorman of the approach of the car, and that he did not know that the car was upon him until it was within a few feet of his automobile. The motorman must have seen, if he was properly attending to the work devolving upon him in operating the car, the dangerous situation of the plaintiff, and he could easily have stopped the car after discovering the same and thus avoided

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inflicting the injuries which resulted from the collision.

This court has held that the rights of the railroad company and the drivers of other vehicles upon the highway are mutual, and it seems to me that it was the duty of the motorman, considering the fact that the physical conditions were such that he had a clear view for 340 feet, when he discovered the situation of danger that the plaintiff was in, to bring his car to a stop and thus avoid the accident.

In the case of *Quirk* v. *Railway*, 130 Mich. 654, 656 (90 N. W. 673), this court said:

"This is not a steam railroad. The plaintiff was in no sense a trespasser. This railroad company occupies a portion of the public highway. Travelers have the right to continue to travel upon this highway, and are not to be treated as trespassers; and if, after discovering that the plaintiff was upon the track, the motorneer failed to take proper precautions to prevent injury to him, a precedent negligence of the plaintiff, if there was any, constitutes no defense."

See, also, *Montgomery* v. *Railway Co.*, 103 Mich. 46 (61 N. W. 543, 29 L. R. A. 287); *Manor* v. *Railway Co.*, 118 Mich. 1 (76 N. W. 139); *Rouse* v. *Railway*, 128 Mich. 149 (87 N. W. 68); *Ablard* v. *Railway*, 139 Mich. 248 (102 N. W. 741); Cooley on Torts, p. 674.

This question should have been submitted to the jury, and I am therefore of the opinion that the case should be reversed and a new trial granted.

MCALVAY, STONE, OSTRANDER, and BIRD, JJ., concurred with KUHN, J.

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CONANT *v.* STONE.

1. WILLS—CONDITIONS PRECEDENT—DEVISE IN RESTRAINT OF MARRIAGE—PUBLIC POLICY.

   A devise of a life estate to testator's son, with the use of the income of testator's estate for life, or so long as the son continued to live with his wife, but in case of her death or a legal separation the son to have the fee simple, created a life estate, which terminated with the death of the son who continued to live with his wife, until his decease, and the title in fee simple never vested, for the reason that the condition was not complied with.

2. SAME—ESTATES OF DECEDENTS.

   Whether the condition was void as against public policy, or valid, the terms of it were not fulfilled and the estate did not pass by the will.

3. SAME—LIFE ESTATE—DESCENT.

   Where testator made no gift of the fee in case the son continued to live with his wife, the remainder vested in his heirs as a part of decedent's estate, and the son, being sole heir, took the fee: nor was this result prevented by the fact that decedent indicated by his will that he purposed to aid his son but not the wife, and having made no attempt to convey the fee to his grandson or any one else on breach of the condition, title could not be held to have vested in the only grandchild of testator.

4. SAME.

   And a clause requiring the executors to convert the estate into income bearing securities within seven years, not having been acted upon, became inoperative after the decease of testator's son within a few weeks following his own death.

Appeal from Osceola; Withey, J. Submitted October 11, 1912. (Docket No. 50.) Decided September 30, 1913.

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Bill by David W. Conant and others against George P. Stone and others for the construction of the will of Milton L. Rice, deceased. From a decree for complainants, defendants appeal. Modified and affirmed.

J. J. Tweddle, for complainants.

George P. Stone and *McCall Bros.*, for defendants.

BIRD, J. The complainants filed the bill of complaint in this cause to secure the aid of the court in construing the last will and testament of Milton L. Rice. The testator executed his will on the 14th day of April, 1911, and passed away on the 20th day of May following. The will was admitted to probate without objection. The testator left him surviving one son, George Willey Rice. The son died a month later. The son left him surviving a widow, Lizzie Rice, and a son, Rex R. Rice, by a former wife. The estate left by the testator consists of real estate of the value of $5,000 and upwards and a small amount of personal estate. The personal estate will be exhausted in the administration of the estate and the payment of legacies. The questions presented for construction arise in the third, fourth, and ninth paragraphs; no question being raised to the other bequests. These paragraphs are as follows:

"*Third.* I give, devise and bequeath to my son, George Willey Rice, of Park Lake, Mich., the use and income from my estate after all debts, expenses and special bequests as provided for in this will are paid and discharged. My said son to have the use and income from said estate so long as Lizzie Rice, his present wife, remains as his legal wife, but in case of her death or in case of a legal separation and divorce, from my said son, I then give, devise and bequeath to my said son and to his heirs and assigns forever, said above mentioned interest in my estate.

"*Fourth.* I further provide and direct that my son above named, shall not assign or transfer the income

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from my estate as above provided, but that the money therefrom shall be used by him for his personal needs and benefit as the same shall become due, and in case my son assigns or transfers said income from the respective shares of my estate as above provided for, that immediately thereupon, all further rights, title and interest that he might then have under the provisions of this will, or that might afterwards become vested, shall cease and be cut off entirely. Said income to be paid to my son by executors once each year."

"*Ninth.* I further provide that any and all real estate that I may die possessed of, shall be sold by executors on or before seven years from the time of my death, and the proceeds invested in several securities so that the income from all my property may be secured to the best advantage for my son above named."

The real contest is between the widow, Lizzie Rice, and the son, Rex R. Rice. The complainants contend that, under these provisions of the will, the son, George Willey Rice, received a life interest only, with a fee simple in expectancy based on the contingency of his living separate from his wife, Lizzie. As he never ceased living with her, the estate in fee never vested in George but fell upon Rex by implication under the will.

It is the claim on behalf of the defendants that the condition annexed to the devise of the fee was void as being against public policy, and therefore the entire estate passed at once to George upon the death of the testator. It is further contended that, if the fee did not vest in George by virtue of the will, it became intestate property, and he as sole heir took title thereto under the statute. If either one of these contentions prevail, the widow, Lizzie, is entitled to her dower interest in the real estate.

The question as to whether the condition annexed to the gift of the fee was void by reason of its holding out an inducement to George to separate from his

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wife, is one with which we need not concern ourselves. Had the gift of the fee been a present devise with a subsequent condition annexed thereto, it would have been of more importance, and the case of *Conrad* v. *Long*, 33 Mich. 78, would have been helpful in settling the law of the case. But the devise of the fee under consideration was not a present one; neither was the condition annexed a subsequent one. It was a condition precedent, a condition that was to be complied with before the fee would vest in George. A separation by death or divorce must take place before the fee would vest in George, according to the terms of the will. If it were a condition precedent, it would be of no importance that the condition was void. Whether void or valid, the fee would not vest until the condition was complied with. 2 Pomeroy's Equity Jurisprudence (3d Ed.), § 933b; 1 Story's Equity Jurisprudence, § 289; 16 Cyc. p. 607; *Phillips* v. *Ferguson*, 85 Va. 509 (8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78); *Ransdell* v. *Boston*, 172 Ill. 439 (50 N. E. 111, 43 L. R. A. 526).

Pomeroy's Equity Jurisprudence, *supra*, states the rule as follows:

"It is ordinarily said that all conditions annexed to gifts which prohibited marriage *generally* and absolutely are void and inoperative. This, however, is a very inaccurate mode of statement, since a condition *precedent* annexed to a devise of land, even if in complete restraint, will, if broken, be inoperative and prevent the devise from taking effect. With this limitation all conditions in general restraint are void."

The testator made no gift over of the fee in the event that the condition was not complied with. Inasmuch as the condition was not complied with, it follows that the fee went into testator's estate and must be disposed of by the statute. George being his sole

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heir, the title thereto would pass to him. *Southgate* v. *Karp*, 154 Mich. 697 (118 N. W. 600).

The testator gave evidence in the provisions of his will that he was desirous of aiding his son George, but that he wanted to effectuate that desire in such a way as not to aid Lizzie, the wife. From this and the further fact that the testator must be presumed to have known that, if the condition was not complied with, he would die intestate as to such part of his property, and it would pass to his grandson, Rex R. Rice, it is argued that the fee passed to Rex under the will by implication. In view of the fact that the testator does not even mention Rex in his will and that he made no ineffectual attempt to dispose of the fee to Rex or to any one else in the event that it failed to vest in George, we think that argument must fail. *In re Donges' Estate*, 103 Wis. 497 (79 N. W. 786, 74 Am. St. Rep. 885). Our conclusion is that George took a life estate by the will and that the fee was cast upon him under the statute.

Since no step was taken by the executors to exercise the power conferred by the ninth paragraph before the decease of George, that paragraph has now become inoperative.

The decree of the chancellor will be modified in accordance with this opinion. The defendants will recover their costs out of the estate.

STEERE, C. J., and MOORE, MCALVAY, BROOKE, KUHN, STONE, and OSTRANDER, JJ., concurred.

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PEQUIGNOT *v.* GERMAIN.

MASTER AND SERVANT — CONTRIBUTORY NEGLIGENCE — INFANCY — STATUTES.

Evidence that plaintiff was 16 years old at the time he was injured, that he had been employed in work at the saw which caused the injuries on numerous occasions previously, that the saw was guarded but the guard had been left up so it did not protect plaintiff, that although it was not necessary to bring his hand nearer than three inches from the saw, in pushing a piece of soft lumber through it, he received an injury to his hand which, his testimony tended to show, resulted from the saw striking a knot and from plaintiff's failure to release the pressure in time to avoid having his hand forced against the saw, required the direction of a verdict for defendant on the ground that plaintiff was guilty of negligence contributing to his injuries.[1]

Error to Saginaw; Gage, J. Submitted April 9, 1913. (Docket No. 11.) Decided September 30, 1913.

Case by Willard Pequignot, by his next friend, against Edward Germain for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Weadock & Weadock, for appellant.

A. Elwood Snow, for appellee.

MOORE, J. The plaintiff, a minor, by his next friend, brought suit under Act No. 220 of the Public Acts of 1911 (2 How. Stat. [2d Ed.] § 4017 *et seq.*),

[1] The question whether one employing child under statutory age may rely on contributory negligence to defeat liability for personal injury to latter, is treated in notes in 12 L. R. A. (N. S.) 461 and 20 L. R. A. (N. S.) 876. And as to presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger, see note in 29 L. R. A. (N. S.) 487.

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prohibiting the employment of male persons under the age of 18 years at hazardous employment, to recover damages for the cutting off of the first and second fingers of his right hand at about the middle joint. From a judgment in favor of the plaintiff, the case is brought here by writ of error.

At the conclusion of plaintiff's testimony, and again at the close of all the testimony, defendant asked for a directed verdict, which was refused. Counsel for appellant in the brief say:

"The errors complained of are because of rulings on the misconduct of plaintiff's counsel in arguing the case, refusal to take the case from the jury at the conclusion of plaintiff's case and at the end of the whole evidence, in refusing to give defendant's written requests to charge, and to the charge as given. There are 24 assignments of error, upon all of which defendant relies, excepting the first, fourth, fifth, sixth, and eleventh, which are abandoned as not sufficiently prejudicial to justify reversal."

The accident happened December 7, 1911. The plaintiff was born January 22, 1896, and was given an employment permit under section 10, Act No. 285, of the Public Acts of 1909, dated December 29, 1910. Photographs of the saw and table where the injury occurred were offered in evidence, and show that a guard was on the table, and when in position came down over the saw, so as to be as effective as a guard could well be. The board which plaintiff was holding when hurt is in evidence. It is a soft pine board, with a hard knot in it about two inches in diameter, through which the saw passed. The plaintiff pushed the board through to the end, cutting off a strip about two inches wide.

In our view of the case it is desirable to quote freely from the testimony of the plaintiff. He testified in part as follows:

"I am the plaintiff in this case. On the 7th day of

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December, 1911, I was employed by Mr. Germain, the defendant in this case, in the cutting room in Germain's factory on Holland street in the city of Saginaw. I was working on the rip table on the 7th day of December, 1911. I had been working on that rip table about two days. I first went to work on the rip table the day before. * * * Two fellows were cutting up lumber. I was taking it and ripping it up into most any size, to get the best out of it. The size of this particular piece that I was sawing at the time of the injury must have been about 12 inches wide, about 18 or 19 inches long, an inch and a half or quarter thick, or an inch and a half. I was required to rip off the worst. * * * The guide was about 2 inches from the saw. I had little sticks to place in between the guide and the saw, and place the board up against when I pushed in here. By that adjustment I could saw off any width piece off the board I wanted to. I took the board; laid it so. I wanted to work off the piece. It was about 12 inches wide. I wanted to rip a 2-inch slab off it. The saw choked. I gave it a shove. It choked. I shoved it, and my hand got on the saw and cut a couple of fingers off.

"*Q.* How did you place the board there?

"*A.* Thumb on the back, two fingers and the thumb on the back of the board, two fingers on the back, two on the side, and pushed it down at the same time, and shoved this through. It choked up, and the board jumped up. It came and shoved it over, and knocked my hand over some way, and my hand got in the saw. It happened so quick I don't hardly know how it did it. It cut a couple of fingers off.

"*Q.* Show them to the jury. (Witness does as requested.) They were cut off at about the middle joint, two fingers, first and second on my right hand.

"*Q.* State how the saw was worked at the time of the injury, at the time you were ripping this particular board.

"*A.* Why, I put the board on the table, and was going to rip off a piece 2 inches. The saw started to choke and jump. The board throwed my hand over off the board. At the time this injury happened, the board jumped up and down. I held it down, shoved it through.

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"*Q.* Explain how you came to get your fingers taken off.

"*A.* It happened so quick, I couldn't say just how it happened; but I know that the piece I ripped about 12 inches wide. I ripped off a piece 2 inches. I started to rip it; ripped a little way; it started to jump; the board jumped up and down; I stood there; it gave a jump; it went right over; it jumped all the way over. I don't know just exactly how it jumped up, and my fingers was cut off. I was paying attention to my business at the time. There was a spreader on here, a guard, I think a half an inch, here below the board it would be 9 or 10 inches, and then there was a spreader in there. It is kept on there to keep from closing in on the top, and the spreader, there is a guard about a half an inch wide, sort of a guard. It is supposed to come from the top here. It is about a half an inch from the top of the saw. The guard on the saw I was working on was up about 5 or 10 inches from the saw. It wasn't put down where it belonged.

"*Mr. Weadock:* I object to that; no allegation as to that.

"*The Court:* You don't claim anything about furnishing proper guard for the saws?

"*Mr. Snow:* No; only to guard the machine.

"*Mr. Weadock:* I object to that as wholly incompetent and immaterial under the declaration.

"*The Court:* As long as counsel says he doesn't claim anything for it, I don't see how it is improper. He says he doesn't claim anything about furnishing the proper guards for the saw.

"*Mr. Weadock:* It might be prejudicial when it goes to the jury.

"*The Court:* So far as the question of the saw being properly guarded, I now instruct the jury that they should not consider this testimony.

"*Q.* Did you, before you worked on this particular saw, work on a ripsaw?

"*A.* I worked on one ripsaw. Ripped organ parts about a week, but not steady. It might have been more than a week; it might have been less. I didn't keep track of the time. I didn't keep track of it. I worked a day or so, and then back on the other place where I belonged. Maybe I would go back again and work a half a day or so.

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"Q. Was it a saw similar to this one you happened to be injured upon?

"A. The table was higher and bigger. Instead of having a guard or the board you had one you could move any place you wanted to rip the board. At the time when I went to work on this saw it was running. I don't know I couldn't say how fast it would revolve.

"Q. How long had you been employed by Mr. Germain? How long had you worked there?

"A. Pretty close to 2 years and perhaps 8 months. I went to work in vacation."

He modified this statement later, to the effect that he did not work all the time. On cross-examination he said in part:

"I attended school a little over eight years. I went through the eighth grade, a couple of weeks in the ninth grade. While I did attend school, I attended practically all the time. When I left the eighth grade, I was promoted to the ninth grade. * * *

"Q. The manual training school?

"A. Yes.

"Q. Did you attend the manual training school part of the time?

"A. Yes.

"Q. How long were you at the manual training school?

"A. Two or three weeks is all. I didn't keep track of the time.

"Q. You were a member of the ninth grade manual training school?

"A. Yes.

"Q. You commenced taking what course?

"A. Machinist. It is a mechanical course. * * * I quit school in 1910.

"Q. And you applied to the inspector, the factory inspector, for permission to go to work?

"A. I was working there at Germain's—it was a little time before Christmas.

"Q. You remember going and getting a certificate?

"A. After I worked in the factory, he asked me how old I was. I told him, and then he sent me for one in December, just before Christmas. * * * I

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took it to Germain's mill. I didn't know who I gave the paper to. I took it in the office. I filed it in the office of Mr. Edward Germain, and this is my signature here. I remember that, because there is a blot.

"*Q.* At the time this was delivered to Mr. Germain, your height was 5 feet 6 inches?

"*A.* They measured me.

"*Q.* Your weight was 136 pounds?

"*A.* That is what I weighed then. I am now 5 feet 8½ inches tall.

"*Q.* Mr. Pequignot, what did you first do at Mr. Germain's mill in 1910?

"*A.* Worked at the box factory; did a little of everything; took away from the cut-off saw, and done sawing on the ripsaw."

He then testified in detail as to the work he did, showing that he worked on a ripsaw at various times.

"*Q.* How long did you work at this particular ripsaw you were hurt at?

"*A.* Oh, I should judge a day and a half or two days.

"*Q.* It was like the other ripsaws you had worked on?

"*A.* Same as a ripsaw.

"*Q.* This one you were hurt at, was there a guard on it?

"*A.* No, sir; there was one there, but about 9 or 10 inches from the top of the table. There was a guard on it, while I was working on it.

"*Q.* And the other machine that you were working on?

"*A.* Why, all that could be done to them; yes.

"*Q.* You are now shown what purports to be a picture. Look at that, and see if that is not a good representation of the ripsaw that you were injured on.

"*A.* It is the same saw, but the hood is down. That was standing almost up and down on the saw. Ever since, while I ran it, it was leaning up that way. The fellow that ran it before I did left it that way. I did not know how to put it down. It was fixed up that way when I started on it. I didn't know how it was to be. This picture shows the same saw. It is down on that. * * *

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"*Q.* That picture shows substantially the correct position of the operator when he is at work here, doesn't it? (showing Exhibit 'B' to witness).

"*A.* Why, it is all right. It is not the way I always do it. I had my hand on top of the board, flat. I said something about the saw getting choked at the time of my accident. The piece of board that I was sawing was pine, and was less than 2 inches. It was over an inch and a quarter; less than 2 inches. I am sure it was no less than an inch and no more than 2 inches. When I was operating on this board, the saw would be in the middle, the guard on this side, 2 inches from the saw. It is only about 2 inches square, so it would be here possibly 2 inches from the saw. I would put the board like that; shove it through there. If there was a small notch on the edge, you put that against your saw. You shove the board away from you all the time.

"*Q.* All you had to do was to hold the board in its place until the saw went through it?

"*A.* Hold the board down; hold it against your guard and shove it through.

"*Q.* You done that by holding the board steady?

"*A.* Yes, and one hand on it.

"*Q.* And the guard protected it on the other?

"*A.* Yes, and to shove it up against the guard.

"*Q.* So there was only one hand on the board when you pushed it through?

"*A.* Yes; I pushed it in that way I illustrate.

"*Q.* If you see that it clogs, what do you do then?

"*A.* Why, if I was feeding the boards too fast, I wouldn't shove it through so fast. The only way it became clogged is by shoving it too fast or if the saw gets dull.

"*Q.* If you shove it too fast, you restrain it, and if it strikes about sometimes?

"*A.* Yes.

"*Q.* Then the way to do that is to start it again and go easy until its gets through the knot? This board you had that day do you think had a knot?

"*A.* Yes; I am sure it did. That is why I ripped a 2-inch piece off to get the knot off. I tried to get rid of the knot. I didn't look at the board to see if I got it ripped off or not. If I don't do it, I would take it off afterwards.

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"Q. You had sawed through the knot before you got hurt? That knot was about a third or a half way of the board?

"A. In the middle or a third across there.

"Q. Near the middle?

"A. I didn't notice. I noticed a knot in the board. I don't remember just where that knot was. It wasn't in the end of the board, I know.

"Q. Did you finish ripping this board when you got hurt?

"A. Yes, sir.

"Q. Now, as a matter of fact, the saw was neither choked nor into a knot at the time you were hurt, isn't that true?

"A. If it ripped through the board, and yet going as fast as it could go, it wasn't choked down.

"Q. The saw was neither choked nor in a knot at the time you were hurt?

"A. No, sir; it was not in a knot.

"Q. It wasn't choked?

"A. It wasn't choked. * * *

"Q. You don't know how you got your finger hurt, do you?

"A. No, sir.

"Q. Now, I show you a board, and ask you to look this over, and ask you whether or not that is not the same board you were working at at the time you got injured.

"A. Well, that is the same kind of a board. * * *

"Q. Just show the jury how you put that board through.

"A. This is the guard. Standing as I am, the guard is on the left-hand side. I pushed the board towards the saw as it goes through it until it gets clear to the end.

"Q. Then you take off your hands?

"A. Like this, up like this.

"Q. Your hand, at the time you got your fingers cut, were on the end?

"A. No, sir.

"Q. Where that stain is?

"A. No, sir; my hand was right here. The last time that dropped off there.

"Q. How it was dropped off you don't know?

"A. That jumped when it struck that knot.

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"*Q.* You had gone through the knot at the time of the injury?

"*A.* Yes, sir.

"*Q.* After you got through the knot, it sawed right along just as it had before it came to the knot, without any jump?

"*A.* Yes.

"*Q.* You see it doesn't show any jumping at all on the edges?

"*A.* That is as—

"*Q.* If it jumps, it makes an extra dig?

"*A.* Yes; there is where it runs.

"*Q.* If it chokes, it makes a bigger nick?

"*A.* Yes.

"*Q.* Look at that carefully, and tell us if it is not true that that board was in just that condition when it went through the saw, just like that.

"*A.* I don't know whether that was the top of the board or not.

"*Q.* Now, your fingers were not necessarily, in the operation of the saw, in any way connected with or touching that saw?

"*A.* No, sir.

"*Q.* And it was not intended that, in running the board through, your fingers would come near the saw?

"*A.* It was sometimes, and sometimes it was not.

"*Q.* In the regular operation, your fingers would not come near the saw?

"*A.* No, sir.

"*Q.* You may have slipped at the time you got injured. May not your foot slipped or something?

"*A.* No, sir; I am sure I didn't slip anyway, my foot, nor nothing.

"*Q.* You don't know now how you got your fingers connected with the saw?

"*A.* No more than what I just said, no more than that.

"*Q.* How many different times did you work on the ripsaw, like this one that you were hurt on, while you were there? Fifty different times?

"*A.* No, sir. I wouldn't try to say how many times it was, I am sure. I never worked on a ripsaw. It wasn't over a week or a week and a half.

"*Q.* You knew how, of course, how to run this ripsaw?

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"*A.* Yes. * * * What I was doing at that time was making pieces about 2 inches wide. The entire length of this board is 18 or 19 inches.

"*Q.* Was this guard turned back, or was it standing up in the air?

"*A.* I couldn't say if it was turned back. Somebody stuck it up that way; it was sticking up in the air.

"*Q.* You knew what the guard was for?

"*A.* Yes.

"*Q.* And how it could be put down from the air?

"*A.* I couldn't tell. All the others I have worked on it was put down.

"*Q.* You said nothing about it being up that way?

"*A.* No, sir; a man worked on it, I thought it would be all right; he told me to. * * *

"*Q.* You were running ripsaws for a number of days before you were hurt?

"*A.* From time to time. I know Mr. William Duboi.

"*Q.* Do you remember applying to him to permit you to work on the ripsaws?

"*A.* I never asked him for a job; no.

"*Q.* Didn't you tell him some weeks before you were hurt you could do that work, you wanted a chance to run the ripsaw, and he did then permit you to, and from that time on until you got hurt you did run it?

"*A.* I don't think so.

"*Q.* Would you say you didn't ask Mr. William Duboi for permission to run ripsaws?

"*A.* That is the way I generally worked on it. I don't remember. The first I remember of working for him on the saw, there was nothing to do in our place. I went over there to work for him. I don't know just why I come to go over there.

"*Q.* How long before you were hurt was that?

"*A.* I couldn't say how long it was. It must have been over a month before.

"*Q.* The work you then asked him to do was on the ripsaw?

"*A.* Yes.

"*Q.* From that time until you were hurt you had from time to time worked on ripsaws?

"*A.* Yes, sir.

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"*Q.* You knew that that hood or guard that was put over the ripsaw was for the purpose of protecting the man that was running it, didn't you?

"*A.* Yes, sir.

"*Q.* You said yesterday that when you went to the ripsaw at which you were hurt that this guard was kept upright?

"*A.* Yes.

"*Q.* I now show you a guard. That is the kind of a guard that was on this saw that you were at work on that day, wasn't it?

"*A.* About the same; yes.

"*Q.* That guard as it now is on the board is in the position it would be when the operator was running it?

"*A.* That is the correct way.

"*Q.* When a man is running the board through it, and when it is operated on? When you said yesterday you couldn't move the guard, you mean this piece, the upright guard?

"*A.* I don't know how they moved that. The saw was running. I didn't fix up the table.

"*Q.* When, if at all, the top part, the part that extends out over the saw, is moved, it is done by pushing it up that way?

"*A.* The other guard was somewhere—

"*Q.* It stood up substantially the same way this did?

"*A.* Yes.

"*Q.* If the operator wanted to push it back, he would do it in that way?

"*A.* Yes.

"*Q.* Is that the position in which this guard was when you were operating this saw?

"*A.* Yes, sir.

"*Q.* You knew that you could put it down that way?

"*A.* You could not put it down.

"*Q.* Did you try to?

"*A.* I don't remember it.

"*Q.* You knew that that guard was up there for the purpose of protecting the employees?

"*A.* Yes.

"*Q.* When you went there to it, it was standing up?

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"*A.* Yes.
"*Q.* And you didn't try to put it down?
"*A.* Yes.
"*Q.* You knew, when the operator was using this saw without the guard, there was more chances for his getting his hands cut than there was with the guard down?
"*A.* Yes.
"*Q.* And you continued to operate the saw for those days with that knowledge?
"*A.* Yes.
"*Q.* And the difference was, when the guard is down, the whole saw is covered, isn't it, and the only space between the guard and this board that the board you are ripping rests on is as shown here, 1¾ inches, perhaps?
"*A.* Yes.
"*Q.* The only chance for one to get his hands in would be under the top end of this guard?
"*A.* That is about the only way.
"*Q.* There would be no chance at all to get struck on the top of the saw when the guard is down?
"*A.* No, sir.
"*Q.* You knew in the operation of the cutting of the board that the saw worked towards you all the time?
"*A.* Yes.
"*Q.* Now, then, when you were putting this board through the saw, the same was revolving towards you very fast?
"*A.* Yes. * * *
"*Q.* You knew, as you pushed this board through, that cut the board, of course?
"*A.* Yes.
"*Q.* When you pushed the board through, as you illustrate, your hand would be on the right-hand corner of the piece, away from the saw?
"*A.* Yes.
"*Q.* And that is the only place you touched your hand on the board?
"*A.* Yes.
"*Q.* The small piece being sawed was being held in place by the guard on the side?
"*A.* Yes.

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"*Q.* You simply put the board through by pushing by one hand until it was sawed through?
"*A.* Yes. * * *
"*Q.* Having this board in mind, that it was the one that you were on at the time, the saw having gone clear through this board, your hand, I suppose, was how many inches from the saw?
"*A.* Oh, it might be, it couldn't have been any more than two inches away.
"*Q.* How about the two fingers, six inches away, wouldn't they, from the saw?
"*A.* About that; yes.
"*Q.* And your thumb would be nearer the saw, of course?
"*A.* Yes.
"*Q.* You knew the danger of sawing this board on that ripsaw that morning with the guard up? You knew there was danger in it?
"*A.* Yes.
"*Q.* And you continued to saw those boards the same way that two or three days you were there?
"*A.* Yes, sir.
"*Q.* With the knowledge of the danger?
"*A.* Yes.
"*Q.* And the danger with the guards up was what? How would the danger be?
"*A.* You would get your hand on the saw through there.
"*Q.* With the guard down you couldn't get your hand on the saw unless you ran it under the guard?
"*A.* That is all, about.
"*Q.* You couldn't do that unless you done it purposely?
"*A.* I don't know about that.
"*Q.* As the board went through, in order to get your hand or finger on the saw, you had to get in below the guard for 2 or 3 inches, wouldn't you?
"*A.* Yes.
"*Q.* So you had to shove your hand under in some way?
"*A.* Yes.
"*Q.* And that, of course, you wouldn't do. Now, then, you neither tried to put down the guard— You didn't try to put down the guard?
"*A.* No, sir.

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"*Q.* You didn't say anything to anybody that the guard should be down?

"*A.* No, sir.

"*Q.* Simply went on and done that work with the knowledge of the danger? You were liable to have your fingers cut with operating the saw with the guard up?

"*A.* Yes."

Redirect examination:

"*Q.* Is this guard here offered for illustration similar to the other one?

"*A.* Yes.

"*Q.* Does it operate the same as the other?

"*A.* I don't know. It had a screw to the hood; that is all I know of. I do know that the guard is kept in place by a bolt running through there.

"*Q.* That is identically the same as the one you worked upon?

"*A.* As far as the hood is concerned.

"*Q.* That was on hinges up and down?

"*A.* Yes, sir. That other one must have been broken, because there was a piece of wood in there. It was right in the hinge. That is why I didn't do anything about it. It looked as though they put it up there to hold it there. I didn't try to put it down in any event. Mr. Chapman directed me to work on this ripsaw. It wasn't Mr. Duboi. He told me to go over and work for Chapman in the cutting room. I don't know that Mr. Wm. Duboi worked on that machine that day before I did. He wasn't the last man to work upon it.

"*Q.* You don't know of your own knowledge?

"*A.* I am quite sure. Mr. Chapman didn't go with me to this ripsaw. He said I should go over there and rip on this ripsaw, and that is all the directions he gave me about it."

The guide on the left hand was 2 inches from the saw, and allowed a strip 2 inches wide to be cut from the board. The other portion of the board was 7¾ inches wide. When the board had passed the saw, the standard which came up through the table and to which the guard was attached entered the kerf made

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by the saw, and acted as a spreader between the wide part of the board and the strip which was being taken off. The board also passed under the joint in the guard, and this would be true whether the front part of the guard is lifted or not. It is clear that to push the board through it was not necessary to get any portion of the hand within 3 inches of the saw.

A reading of the testimony of the plaintiff indicates that he does not know how the accident happened. An examination of the board and of the photographs gives rise to a fair inference that the saw did its work readily as it entered the soft pine until it struck the hard pine knot, which made it necessary to exert much more strength to push the board forward until the knot was sawed through, when, if the pressure was continued, the saw would cut the remaining portion of the soft pine very rapidly, and if the fingers of the plaintiff were in the line of the saw they were likely to be cut off. It is not a far-fetched inference to say that this is what probably happened. If the guard had been down, the hand could not have reached the saw. If the board had been properly pushed through, the injury could not have happened. If plaintiff had not himself been negligent, he would not have been hurt. We think, in principle, the case is controlled by the case of *Beghold* v. *Auto Body Co.*, 149 Mich. 14 (112 N. W. 691, 14 L. R. A. [N. S.] 609), and the many cases cited therein.

The verdict should have been directed in favor of defendant as requested. This makes it unnecessary to discuss the other assignments of error.

The case is reversed, and a new trial ordered.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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BITTNER *v.* HOWIE ROOFING CO.

MASTER AND SERVANT—SCAFFOLD—MATERIALS FURNISHED—DUTY TO SUPPLY SUITABLE LUMBER.

In the construction of a scaffold for the erection of a building, it is the master's duty to provide suitable material: evidence that plaintiff was hurt by the breaking of a weak board containing a knot, that other men had refused to work on the scaffold because they considered it unsafe, that there was not sufficient good lumber at hand when the scaffold was built to construct a safe one (although defendant produced testimony to the contrary), warranted the court in submitting to the jury the question whether suitable material had been supplied.

Error to Wayne; Hally, J. Submitted April 10, 1913. (Docket No. 23.) Decided September 30, 1913.

Case by Gustave Bittner against the Howie Roofing Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Keena, Lightner, Oxtoby & Oxtoby, for appellant.

Florian, Moore & Wilson, for appellee.

MOORE, J. Plaintiff was injured on February 9, 1911, while in defendant's employ, upon a scaffold. The writ of error is brought in this case to review a judgment obtained in his favor.

It is the claim of the plaintiff: *First.* That suitable and sufficient scaffold building material was not furnished on the job by the master before the accident. *Second.* That the foreman employed to supervise the erection of the scaffold was an iron worker and was not a judge of different varieties of wood

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and was not competent to supervise the erection of a scaffold.

The plaintiff was not familiar with the English language. He was about 30 years old, had been a painter, and had followed other callings. He testified:

"When I came on the job in Wayne the scaffold had already been up and a part of the work had already been done. I assisted in moving the scaffold from place to place on the first two days. I had never acted as a carpenter nor as a wood worker. I know nothing about the strength of different timbers."

The defendant was erecting a building in Wayne, having a steel frame and a corrugated iron covering, for the good roads commission. The plaintiff was a helper. The day he was hurt he stood upon a platform under the roof, holding a block under a rivet while the man upon the roof hammered the rivet. In the scaffold were one or more planks 2x6 inches. The plaintiff stepped upon one of these. It broke and he fell to the ground more than 20 feet below and received severe injuries. It is claimed the plank broke because it had a large knot in it. Many witnesses were sworn on the part of the plaintiff. One was sworn on the part of the defendant.

The judge charged the jury in part as follows:

"In considering the question whether defendant had performed its duty in supplying suitable material for its scaffold, it makes no difference whether the material on hand belonged to defendant or whether it belonged to the good roads commission or any other person so long as Keen understood that he had permission, expressed or implied, to use such material. It is immaterial whether the plank which broke belonged to defendant or not. The important and only question for you to consider is whether, at the time the plank was taken for use in the scaffold, there was on hand, subject to the use of Keen and his men, other lumber from which they might have selected good plank for the purpose. If you find from all the evidence that there was sufficient material on hand at

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the time the scaffolds were built from which the men could select suitable material, and that the accident happened because the scaffold was constructed in an improper manner, your verdict will be for the defendant. Even if you think there was no other material on hand for Keen and his men to select from when the scaffolds were put up, nevertheless if from the evidence you should find that, at the time the scaffolds were moved and rebuilt within a day before the accident, there was lumber on the premises which the men could have used to replace any defective timber, then your verdict will be for the defendant.

"You will not find defendant liable in this action on any theory that it did not perform its full duty to plaintiff except only by deciding against defendant's contention the specific propositions, as explained to you elsewhere in the court's charge, that the defendant did not place at the disposal of Keen and the men sufficient lumber from which Keen and the men could have made a selection of good material with which a safe scaffold might have been built."

Counsel for the appellant contend, and we quote from the brief:

"By its assignments of error the defendant and appellant raises in this court the sole question whether, upon the entire record, a verdict should have been directed in favor of the defendant. The exceptions taken upon the trial, which do not bear upon this proposition, have been waived, and, if the court does not agree with us on this proposition, we ask that the judgment in the court below be affirmed."

Counsel urgently contends that there was a sufficient supply of suitable material to make the scaffolds. That, if defendant did not own it, it had permission to use material belonging to the good roads commission, for whom defendant was doing the work. On the part of the plaintiff counsel call attention to testimony that indicates there was not an adequate supply of suitable material, and that two men had declined to work because they did not regard the scaffold as safe. It would profit no one to set out this testimony

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in detail. We shall content ourselves with saying that we think there was enough of it to justify the charge of the court to the jury. See *Thomas* v. *Railroad Co.*, 114 Mich. 59 (72 N. W. 40); *Carnell* v. *Halpin*, 159 Mich. 42 (123 N. W. 578).

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

ISBERG v. MILLER.

REFORMATION OF INSTRUMENTS—MISTAKE—CONTRACTS—EQUITY—RESTRAINT OF TRADE.

A decree reforming a contract between complainant and defendant for the sale of defendant's grocery stock so as to include a provision against defendant engaging in the business for two years on a street mentioned, *held*, to be sustained by evidence of mutual mistake in drafting the instrument.

Appeal from Wayne; Hally, J. Submitted April 11, 1913. (Docket No. 47.) Decided September 30, 1913.

Bill by Samuel Isberg against Louis H. Miller and Julius Goldman for reformation of a written contract and other relief. From a decree for complainant, defendants appeal. Affirmed.

Arthur E. Fixel and *Max H. Finkelston*, for complainant.

Edward Pokorny, for defendants.

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MOORE, J. Complainant filed his bill of complaint to reform a written contract which provided for the sale of real estate and contents of a grocery store.

The claim of the complainant is that Mr. Miller during the negotiations personally agreed to remain out of the business of keeping a grocery store for a period of two years between Thirtieth and Thirty-first streets on Michigan avenue, and that he now proposes to violate his agreement, and that this agreement was inadvertently left out of the written agreement. The plaintiff speaks and understands English very imperfectly.

The bill of complaint concludes as follows:

"(11) Your orator further shows that he will suffer great and irreparable loss and damage if said Louis H. Miller continues to conduct said business at 1465 Michigan avenue, and that said Louis H. Miller should be restrained from operating said business at 1465 Michigan avenue, from managing the same, or participating in its management, conduct, or ownership, directly or indirectly.

"(12) Your orator shows that the purchase price of the stock in trade and good will of the said Louis H. Miller's business at 1464 Michigan avenue involved a consideration of, to wit, seven thousand dollars, on which account moneys and property were paid to said Louis H. Miller by your orator, to the amount of, to wit, fifty-seven hundred dollars, and that the balance on said purchase price of seven thousand dollars is not yet due.

"Your orator is without remedy, except in a court of equity, and therefore prays:

"(1) That the said defendants, Louis H. Miller and Julius Goldman, make full, true, direct, and perfect answer to this your orator's bill of complaint.

"(2) That the said contract for the sale of the business of Louis Miller at 1464 Michigan avenue, under date of December 16, 1911, may be reformed so as to contain a provision prohibiting said Louis H. Miller from engaging in the grocery, crockery, or tinware business on Michigan avenue, between Thirtieth and

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Thirty-first streets, in Detroit, Mich., for a period of two years from and after December 16, 1911.

"(3) That the court issue an injunction restraining said Louis H. Miller from participating in any manner in the management, conduct, or ownership of the business at 1465 Michigan avenue, Detroit, Mich. That said injunction likewise prohibit said Louis H. Miller from interfering in any manner with the free enjoyment of the good will of the business formerly conducted by him at 1464 Michigan avenue, Detroit, Mich., which business and the good will thereof were purchased by your orator.

"That your orator may have such and other relief as to the court may seem proper. That the court may award your orator such damage as it may be found on the hearing your orator sustained by reason of the wrongful conduct of said Louis H. Miller."

The negotiations covered a considerable period of time, and many papers were drawn in connection therewith, which were changed, interlined, and modified before a contract was finally signed. Each party employed a lawyer, and the lawyers had trouble in understanding and putting in shape the views of the parties.

There is much testimony to the effect that an agreement was made as stated in the bill of complaint, and that it was by mistake left out of the written contract. The attorney for Mr. Isberg swears positively to this, and says he dictated the agreement to his stenographer, and supposed it was put into the contract, and takes the blame for not discovering it was left out. His draft was afterwards submitted to the attorney for defendant. This attorney was not present at some of the interviews. He was sworn as a witness by the defendant. In his testimony appears the following:

"*Q.* You say that Mr. Isberg insisted that tinware and crockery be added to that paragraph?

"*A.* Yes.

"*Q.* Following that request or demand of Isberg,

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did you follow that up by saying that this option should be put in there regarding the forfeiture?

"*A.* I don't know which preceded which. We discussed paragraph by paragraph, and frequently one or two of us gentlemen would leave the room, and the talking would continue just the same. I couldn't tell you in what order we took it up.

"*Q.* Now, Mr. Butzel, there was a great amount of talk back and forth, wasn't there, regarding this contract, before it was finally whipped into shape and signed?

"*A.* As to the details, yes; but the deal was going through earnestly desired by all parties. There never was a question about that. Sometimes, you know, you get into a deal, and you will find that something will fall short, something of that sort; but I don't think anybody had a notion that the deal was not going through. It was just a question of doing the fair thing in regard to the small details. Whenever Finkelston and I said, 'That is all right,' that that was the right thing, why, there was no kick on anybody's part, and he and I could usually agree without much trouble. In fact, I am fair to say that I protected Mr. Isberg on a few things as much as I did Miller, and I think Mr. Finkelston was equally fair in the matter.

"*Q.* Mr. Butzel, when this contract was finally prepared in the shape it is now in, will you say whether or not that included all of the agreements between the parties?

"*A.* That I couldn't say; it is all that I think of.

"*Q.* You think there is anything left out?

"*A.* I don't know; I don't know how much the original draft included, or what the talk was that preceded my first meeting there. * * *

"*Q.* With reference to that paragraph, the restriction clause, on the last page of Exhibit 3, it states there that Miller is to be prohibited from the use of his real estate between Thirtieth and Thirty-first streets on Michigan avenue. Do you recall any talk regarding the tenants Miller had in the store next to 1464, about the tenant possibly changing his business and going into the grocery business?

"*A.* I don't recall that; no. I know that Isberg was troubled; he was terribly afraid of competition;

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he wanted to be very sure there would not be any grocery next to him, and insisted—he was very insistent on that point.

"Q. That there would not be a grocery store next to where he was, to what he was buying from Miller?

"A. Yes, sir; he realized it was quite a profitable undertaking that he had there.

"Q. Is that how that paragraph came to be in there?

"A. It was put in previously.

"Q. Put in previously?

"A. I think it was.

"Q. As modified in those two particulars?

"A. Yes.

"Q. I will ask you, Mr. Butzel, whether at any time while you were present in Finkelston's office, and Isberg and Mr. Miller were present, if you heard Isberg demand that Mr. Miller be personally prohibited from going into business?

"A. I don't think I did; I don't remember it.

"Q. Don't you think you would have heard it, if Isberg had personally demanded that Mr. Miller be prohibited from going into business himself?

"A. I would have heard it; whether I would remember it or not is another question.

"Q. Did—

"A. It might have happened when I was out of the room. I went out of the room to dictate to the stenographer several times. Once in a while they would get around me and talk so much that I went to the next room to take a little rest.

"Q. Did you submit that paragraph to Mr. Miller and explain what it meant, ask him for his approval?

"A. Well, that never was necessary. If I read anything to Miller, he was a very good, clear-headed, business man; he would understand it right off the bat. He had splendid command of every feature of the situation. He was a very satisfactory client. I felt constantly that I was sharing the responsibility. You had to explain the thing to Isberg four or five times, and then he wasn't sure he got it right; but Miller understood it right away, was a very good man to work for.

"Q. Well—

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"*A.* Isberg couldn't get it through his cranium; Miller understood it right off.

"*Q.* Now, Mr. Butzel, can you recall the day the contract was signed?

"*A.* Well, I wasn't present when it was signed.

"*Q.* You were not present?

"*A.* No. * * *

"*Q.* The only discussion you recall you had was regarding the addition of that clause of putting in of tinware and crockery part, and then the addition regarding the option?

"*A.* We all had a very strong impression—where it came from I don't know—that Miller simply was not going into business.

"*Q.* Was it discussed?

"*A.* No. Miller spoke of future plans and things of that sort, and the atmosphere seemed to be that he wasn't going to go into business; but he made no distinct promise. I don't know of any demand that was made on him at all.

"*Q.* Do you remember any distinct promises?

"*A.* No, no.

"*Q.* That is all."

Cross-examination, by Mr. Fixel:

"*Q.* Then there was a kind of general tone or understanding there that Miller was not going back in business for a while, at any rate?

"*A.* I had that general impression.

"*Q.* Did you gather that from the conversation that was had generally among these people?

A. No, more from Mr. Miller's own conduct, his own attitude, than any particular thing. I didn't think they seemed to insist on it. It seemed to be Miller's intention. I don't think the matter came up.

"*Q.* You were absent from a great many of the meetings, weren't you, or from some of them, but you heard about that later on?

"*A.* I was absent from all meetings previous to the first time, when I was called in. There had already been prepared a contract, at least, the one I mention.

"*Q.* You had a copy of it at your office?

"*A.* That was brought to me by Miller. That is before I made any appearance. What took place be-

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fore that time I don't know. I didn't ask Miller. He handed me this.

"*Q.* It was a carbon copy of it?

"*A.* Yes. Then I went there several times, and the parties were assembled before I came. I knew about how tardy they were coming over there. Miller was usually fairly prompt. I always said, 'Let me know when they are there.' When I came over they were assembled; they were all there, were all pretty busy talking things over.

"*Q.* You never were out at the store, No. 1464?

"*A.* Never. I don't know where it is. * * *

"*The Court:* Mr. Butzel, now that this is somewhat fresh in your mind, can you remember any remark, can you remember what was said, about this man not personally engaging in business for two years?

"*A.* I don't think that was said in my presence.

"*The Court:* Was it said to you by anybody?

"*A.* By anybody? I don't think there was any such promise given while I was around. As I say, the only thing was that Miller had quite a number of pleasant plans and so forth; the atmosphere was created that he was leaving the business, that he was tired out and wanted to get out of business, and so forth. I do not think the necessity of binding him to that entered anybody's head. Possibly a provision of that kind, a provision of that sort, might have been made by him before I ever came in or before they had the paper drawn; but while we were there that idea was there, simply taking it for granted—I don't think there was any reference to it.

"*Q.* That is, in your presence, as far as you know?

"*A.* In my presence, as far as I know.

"*Q.* That is all."

The case was tried in open court. The testimony was very voluminous. The record contains upwards of 350 pages. At its conclusion the trial judge who saw the witnesses said:

"I find that it was expressly understood between Samuel Isberg and Louis H. Miller that the defendant was not to engage in a similar business on Michigan avenue, between the streets named, for a period of

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two years, and that by an inadvertence this clause and proviso was omitted from the written instrument which was drawn to express the will of the parties.

"Not only was this mistake made in drawing the contract, but the defendant, by his conversation with others, and by his conduct in opening the new store, for a considerable time believed the bargain he had made restricted him. He subsequently learned of its omission, and gave as his excuse the omission of the restriction from the written instrument. This is, in my judgment, sufficient to establish the two essentials to give equity jurisdiction, to wit, the making of a mistake, and both parties, at least for a time, admitting that a mistake had been made; the defendant's admission being clear to me from his conduct, and the testimony produced.

"The contract will be reformed in accordance with the prayer of the complainant, who is entitled to the relief prayed for, except as herein otherwise specified.

"Some testimony was offered as to the damages sustained. This testimony was not entirely satisfactory. A court of equity is not an advantageous place to present such an issue, and, considering the time which has elapsed since the case was submitted, I cannot see how full justice could be done to the parties in this proceeding. This issue should be presented to the law side of the court. Complainant will have costs and a decree in accordance herewith."

We have stated some of the testimony. It would profit no one to quote fully the details of the testimony. A careful reading of it satisfies us that the conclusion reached by the trial judge was correct.

The decree is affirmed, with costs.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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PEOPLE v. WORGES.

1. CRIMINAL LAW—EVIDENCE—POPULATION—CENSUS—ESTIMATE.
   Testimony that the population of a township had increased since the last census, and that in the judgment of the witnesses, being officials and others, the population was more than 1,000 at the time the township board passed a resolution authorizing respondent to keep his saloon open until 11 p. m., was properly excluded in the absence of an actual enumeration of the inhabitants.

2. SAME—TRIAL—ADMITTED FACTS—TRIAL BY JURY—DIRECTING VERDICT—INSTRUCTIONS.
   It was not error for the trial court to advise the jury, after they had been out some time, that they ought not to have any difficulty in reaching a verdict of guilty, but that they must pass on the question, permitting the jury to retire and bring in a verdict against respondent who had admitted the fact of keeping his saloon open after 9 p. m.

3. SAME—GOOD FAITH.
   The fact that a retail liquor dealer kept his saloon open after 9 p. m., relying in good faith on a resolution of the township board permitting him to remain open until 11 p. m., was no defense to a prosecution in which it was not proved that the population of the township, shown to have been 721 at the last census, had thereafter increased above 1,000. Act No. 291, Pub. Acts 1909, § 17 (2 How. Stat. [2d Ed.] § 5071).

Exceptions before sentence from Bay; Collins, J. Submitted April 17, 1913. (Docket No. 126.) Decided September 30, 1913.

Frank C. Worges was convicted of violating the liquor law. Affirmed.

Grant Fellows, Attorney General, and *James L. McCormick*, Prosecuting Attorney, for the people.

Curtis E. Pierce, for respondent.

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MOORE, J. The respondent, a regularly licensed retail dealer in liquors in the village of Mt. Forest, Mich., was informed against for keeping his saloon open after hours on the 20th day of April, 1912. Defendant pleaded not guilty. Upon the trial of said cause by a jury, respondent was convicted and sentence deferred pending appeal to this court.

Mt. Forest is not an incorporated village. The respondent runs a hotel there in connection with his saloon business. The village of Mt. Forest has no police protection outside of one or two constables elected and residing somewhere in the township of Mt. Forest. The population of Mt. Forest proper would not exceed 25.

James P. Hartley, a witness for the people, testified that the saloon was open at 9:25 p. m. and again at 9:40 p. m. Other witnesses on the part of the people testified to the same effect. Later the respondent admitted the saloon was open as stated. The county clerk produced the United States census report for the census of 1910, which showed that the population of the township of Mt. Forest, which includes the village, was 721.

On the part of the defense the following occurred:

"*Q.* The population of the township has increased since 1910?

"*The Court:* You need not answer that question. (Defendant excepted.)

"*The Court:* Just a moment. Mr. Pierce are you proposing to show any enumeration made by anybody as to the number of people or the amount of the population of that township in the year 1912?

"*Mr. Pierce:* The best I can do on that subject is to show by resident officials of the township that there has been a remarkable increase in population since the time of this census and that the population in 1912 and 1911 exceeded 1,000. I will have evidence upon that branch of the case.

"*The Court:* I knew you would have evidence on that branch of the case, and you have not answered

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the question that I asked. Are you proposing to prove an enumeration made by somebody on that subject during the year 1912?

"*Mr. Pierce:* We have employed nobody to make an enumeration. There has been none made, official or otherwise, that I know of. I don't know how far that goes—no accurate enumeration, no counting nose by nose of the population, but an estimate based upon examination of conditions and the census and school reports.

"*The Court:* That is, you propose to prove by inference and by estimate?

"*Mr. Pierce:* We propose to show by creditable testimony that the opinion of these witnesses is from an examination they made that the population is over 1,000. Of course, there has been no actual enumeration either official or otherwise.

"*The Court:* Since the last ruling I have examined the liquor statute. The statute for certain purposes fixes the last United States census as the guide as to the amount of population. Now it is a matter of law that there is no State census taken, and it appears in evidence in this case, or it has been stated by counsel for defendant, that there is no claim of any official enumeration of the township since the United States census of 1910. I understand counsel to say that he does not propose to offer any unofficial census or enumeration. Is that right, Mr. Pierce?

"*Mr. Pierce:* No actual enumeration.

"*The Court:* If there was an actual census or enumeration offered unofficially, I would consider that question, but inasmuch as none is proposed to be offered I will not pass on that. .* * *

"*Mr. Pierce:* The court might not be aware of the fact, but it is a fact, which we propose to establish by competent evidence, that the township board passed a resolution authorizing the—

"*The Court:* I will admit that in evidence when we reach it.

"*Mr. Pierce:* Then I would like to interrogate the witness as to the time of the passage of that resolution, if, in his judgment, the population did not exceed 1,000 as referred to in the statute.

"*The Court:* That I would hold as incompetent. That is covered by my previous ruling. You may

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have an exception to all of the ruling I have made on the subject.

"*Mr. Pierce:* Then, as I understand it, the court overrules my offer to show by this witness that at the time this resolution was passed the township population exceeded 1,000.

"*The Court:* I exclude the witness' opinion as to what the population was.

"*Mr. Pierce:* I take an exception.

"*The Court:* I wish you to have the benefit of the situation fully. I hold that, on an important question like this as to the amount of the population, the legislature never intended it to be proved by a matter of opinion; that the only competent proof of it that there could be on that subject would be an actual official or unofficial enumeration or census, and that any other testimony on that subject would be incompetent. I hold that the State census or the last United States census or the last State census would be material. I do not know just exactly how I would hold if an official township census of some kind were shown or if an unofficial township census were shown. There is no proof that either of those have been taken, so I withhold my opinion on that, and yet I am strong of the opinion that the law intends to refer the census matter to the last United States census in every case."

Mr. Ashley G. Rolfe, being duly sworn for the defendant, testified in substance as follows (examined by Mr. Pierce):

"I have resided in Mt. Forest township for about 17 years. I was highway commissioner for several years of the township of Mt. Forest until this spring, when my term expired. In my capacity as highway commissioner, my duties called me about the township and in different portions of it.

"*Q.* Has there been an increase in population there since 1910 or otherwise?

"*Mr. Hitchcock:* I object to that as irrelevant.

"*A.* There is a large—

"*The Court:* The objection is sustained. * * *

"*Mr. Pierce:* We offer to show by this witness that the population of Mt. Forest at the time the resolution was passed by the township board, changing the

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hours from '7 o'clock in the forenoon until 9 o'clock in the afternoon,' that at the time that resolution was passed by the township board, giving Mr. Worges upon his petition the privilege of keeping his saloon open 'from 6 o'clock in the forenoon until 11 o'clock in the afternoon,' that the population of the township of Mt. Forest was upwards of 1,000 people.

"*The Court:* Proceed with your testimony. I have understood from you plainly and clearly that you did not propose to offer any census of that, any enumeration.

"*The Court to witness:* How do you know that the population is more than 1,000 up there?

"*A.* I know what the population was, and I know how many settlers about have come into the town and about what their families are.

"*The Court:* You never have taken any census of the town?

"*A.* I have written their names up of the whole township three or four times for different firms.

"*The Court:* All of the people in the township?

"*A.* Yes, sir.

"*The Court:* You may proceed with the examination.

"*Q.* Has there been an increase in the population there since 1910 or otherwise?

"*Mr. Hitchcock:* I object to that as incompetent, calling for an opinion. It is not a census or enumeration.

"*The Court:* In so far as it is a matter of opinion, it is objectionable. He may state any facts he has in reference to the matter.

"*Q.* What would you say at that time the population was?

"*Mr. Hitchcock:* Same objection.

"*The Court:* That calls for an opinion, and it is not competent.

"*Mr. Pierce:* Your honor asked him some questions, and, having answered the questions, I thought you had modified the ruling.

"*The Court:* I modified it as to facts and only as to facts, not as to opinion.

"*Q.* How many people at the time the resolution was passed in 1911 would you say the township of

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Mt. Forest had; what was the population of the township?

"*Mr. Hitchcock:* Same objection.

"*The Court:* Same ruling. I have already ruled on that.

"*Mr. Pierce:* We take an exception to the ruling of the court."

The township clerk was sworn and produced the records of the meetings of the township board.

"*The Court:* The record may be read in evidence, and it may be made a part of the record in the case, and the whole matter will be covered by a ruling later.

"It appears from the record that, prior to the time respondent went into business at Mt. Forest, communications were had between him and the township board of Mt. Forest, and that he made an application to the township board for a liquor license; that at a meeting of the town board of the township of Mt. Forest, held on the 14th day of April, 1910, the full board being present, it was resolved:

"'That the application of F. C. Worges for retailing liquor in the village of Mt. Forest be accepted, providing that he puts up a good cement building and keeps a good general hotel.'

"On the 13th day of September, 1911, at a meeting of the township board of Mt. Forest township, the following motion was put to vote and carried:

"'Motion made by C. Heppner, supported by F. Stevens, that the petition of Frank C. Worges to keep his saloon open from 6 o'clock in the forenoon until 11 o'clock in the afternoon, standard time.'"

"*Q.* The Frank C. Worges referred to in that resolution is the defendant in this case, is that right?

"*A.* Yes, sir.

"*Q.* I will ask you whether or not, at the time that resolution was passed, the population of the township of Mt. Forest exceeded 1,000?

"*Mr. Hitchcock:* Same objection. (Objection sustained, and defendant excepted.)

"*The Court:* You never made any census of the town, did you, Mr. Quigley?

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"*A.* No, sir; all I had was my school census I make every year.

"*Mr. Pierce:* I think that about the only point to pass upon is the point of law. I will concede that the defendant on the 20th day of April, 1912, at the time alleged in the information filed against him in this case, kept his saloon open at the time sworn to by the people's witnesses, I think that is all.

"*The Court:* I presume that your client justifies under the resolution of the town board. Is that a part of your case?

"*Mr. Pierce:* Yes, I was going to swear the defendant.

"*The Court:* You may if you wish.

"*Mr. Hitchcock:* If Mr. Pierce wants to have that statement appear in the record, it may be put in to save time.

"*The Court:* Yes, your client is entitled to that presumption in the case.

"*Mr. Pierce:* Yes, acting on this resolution, the defendant in this case in good faith and honestly thought he had the right to keep his saloon or place of business open up to the hour in the afternoon, to wit, 11 o'clock, indicated in said resolution.

"*The Court:* Those presumptions are reasonable, in favor of the defendant, that he acted on that theory."

The respondent preferred the following requests to charge:

"*First.* If you find from the testimony that the defendant honestly and in good faith considered that he had the right to keep his saloon open from 6 o'clock in the forenoon until 11 o'clock in the afternoon, and that this privilege was granted him by the township board of Mt. Forest township, and you further find from the evidence that defendant's saloon was closed at or before 11 o'clock, standard time, on the 20th day of April, 1912, I charge you that defendant should be acquitted and your verdict should be not guilty.

"*Second.* The general rule prevailing in criminal cases is that a defendant cannot be convicted of a crime unless he had a criminal intent, and I charge you that if you find from the evidence in this case

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that defendant believed that he had the legal right to keep his saloon open until 11 o'clock in the afternoon, and that he did not intend to violate the law, then you should acquit the defendant."

Defendant duly excepted to the refusal of the court to give these requests. He charged the jury in part as follows:

"The Warner-Cramton liquor law of this State, § 17, says in substance that all saloons and all other places where liquors mentioned in the act are sold or kept for sale, shall be closed at certain times, and in mentioning the times it says, 'and on each week day night from and after the hour of 9 o'clock until 7 o'clock of the morning of the succeeding day; so that the general law makes the broad statement that saloons shall be closed from 9 o'clock on until 7 o'clock the next morning. The law goes on further and says, 'It shall be the duty of sheriffs, marshals, constables and police officers to close all saloons,' etc. It further says, 'The word "closed" in this section shall be construed to apply to the back door or other entrance, as well as to the front door; and in prosecutions under this section it shall not be necessary to prove that any liquor was sold: *Provided*, that in all cities, incorporated villages and townships of not less than 1,000 population, exclusive of villages, where there is police protection, the common council or board of trustees, or council, or township board, may by ordinance allow the saloons and other places where said liquor shall be sold to open at 6 o'clock in the forenoon and to remain open not later than 11 o'clock in the afternoon.' That makes an exception to the general law which I have stated to you, and that exception can only be effective by the action of the township. * * *

"Now, assuming to act under that provision of the law, the township board passed a resolution authorizing the defendant to keep his place of business open from 6 in the morning until 11 in the evening, and the defendant claims, and it is not questioned, that, relying upon that law, he kept his saloon open during the times from 6 until 11. The question comes up as to whether the case presents any legal right for him to have taken this step. * * *

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"*First*, as to the population, it appears by the census of 1910 that the population of the township was between 700 and 800. In another place the Warner-Cramton law refers to the last census as a guide in determining population, and I think that is reasonable, because I think that there must be some definite statement of population.

"Now, there has been no census taken since then. Possibly the question might be a little more clear if some person had made an enumeration by the counting of the population and had been ready to testify to that, but there was no testimony of that kind in the case. You have heard the testimony that was offered, and I hold that under the situation in this case no testimony was offered and none produced showing that the population was 1,000, so that this defendant did not have that proposition in his favor when the township board acted, and the township board does not assume to have expressed any opinion on the question of population, and there is nothing to prove that they considered that question at all, but on that account, and for the reasons that I have stated, the population was not shown to be more than 1,000 when the resolution was passed, and it is not shown by any competent testimony to be 1,000 up to the present time.

"There is another much more important question in the case. You will observe that one of the conditions which would be necessary before the board could legally act upon would be this: This could only be enacted where there is police protection. Now I hold as a matter of law, under the testimony in this case, that the township board was not authorized to act upon that proposition because there was and is no showing that the township at that time had any police protection. The showing is that there were some constables elected, but I do not believe that the office of constable equals that of the office of policeman. I do not believe under the law that the fact that there are constables in a township affords the police protection required by the statute. That is practically made to appear in one clause here, 'It shall be the duty of sheriffs, constables, marshals and police officers;' the statute itself making the plain distinction between constables and police officers. * * *

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"In cases of this kind, notwithstanding the fact that there is no dispute about the testimony, it is the duty of the jury to pass upon the question and report to the court whether the defendant is or is not guilty. So you may retire to your jury room and bring in your verdict. If the defendant had his place of business open after 9 o'clock on the evening in question, he is guilty. You may retire, gentlemen."

Thereupon the jury, having been out for a time, were brought into court and the following took place:

"*The Court:* Have you agreed upon a verdict, Mr. Foreman?

"*The Foreman:* We have not.

"*The Court:* Does there seem to be any difficulty in understanding the charge of the court?

"*The Foreman:* No, there does not seem to be no misunderstanding, only some of them vote, but they don't say anything, and we voted, and I tell them to think it over a little bit and we vote again.

"*The Court:* There is no dispute in the testimony in the case, gentlemen. The testimony of the people shows that the saloon was open after 9 o'clock. The defendant did not introduce any testimony, so that it is proved that the saloon was open after 9 o'clock and not disproved. The court instructed you that, if the saloon was open after 9 o'clock on the day in question, it was your duty to bring in a verdict of guilty. The fact that the town board passed a resolution is no protection to the defendant in any way. It is no defense. So far as the law is concerned, that resolution of the town board was worth no more than the resolution of anybody anywhere in the State. It is no protection whatever. The case appears to be clear, and I should think you would have no difficulty in at once reaching a conclusion that the defendant was guilty. In criminal cases the jury, however, must finally pass upon the question. You may retire.

"Thereupon the jury retired, and having been out for a time, they returned and rendered a verdict of guilty as charged against respondent."

Because of the questions raised by counsel for respondent, we have deemed it necessary to quote all

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of the material parts of the record. We quote from the brief of counsel:

"Defendant claims that there is error in this record, and we consider the several assignments of error upon which we rely under the following synopsis:

"(1) The court erred in excluding defendant's offered testimony as to the population of Mt. Forest township.

"(2) The court erred in his instructions to the jury upon the question of police protection and in charging that defendant was not protected in any way by the resolution of the township board enlarging the time of keeping open defendant's saloon from 6 a. m. to 11 in the afternoon.

"(3) The court erred in recalling the jury while deliberating upon its verdict and directing a verdict of guilty.

"(4) The court erred in refusing defendant's first and second requests to charge."

Groups 1 and 2 may be considered together. A reference to the record which we have quoted shows that in response to an inquiry by the court, counsel said:

"*Mr. Pierce:* We have employed nobody to make an enumeration. There has been none made, official or otherwise, that I know of. I don't know how far that goes—no accurate enumeration, no counting nose by nose of the population, but an estimate based upon examination of conditions and the census and school reports."

The record also shows that the judge informed the counsel that he was simply excluding estimates, opinions, but would allow facts to be presented:

"*Mr. Pierce:* Then I would like to interrogate the witness as to the time of the passage of that resolution if, in his judgment, the population did not exceed 1,000 as referred to in the statute.

"*The Court:* That I would hold as incompetent. That is covered by my previous ruling. You may

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have an exception to all of the ruling I have made on the subject.

"*Mr. Pierce:* Then as I understand it the court overrules my offer to show by this witness that at the time this resolution was passed the township population exceeded 1,000?

"*The Court:* I exclude the witness' opinion as to what the population was.

"*Mr. Pierce:* I take an exception.

"*The Court:* I wish you to have the benefit of the situation fully. I hold that on an important question like this as to the population, the legislature never intended it to be proved by a matter of opinion; that the only competent proof there could be on that subject would be an actual official or unofficial enumeration or census; and that any other testimony on that subject would be incompetent. I hold that the State census or the last United States census or the last State census would be material. I do not know just exactly how I would hold if an official township census of some kind were shown, or if an unofficial township census were shown. There is no proof that either of those have been taken, so I withhold my opinion on that, and yet I am strong of the opinion that the law intends to refer the census matter to the last United States census in every case."

No actual counting, made officially or unofficially, was shown or offered to be shown. There is nothing to show that the question of population was presented to the township board when the resolution was passed, or that they were actuated by the matter of population. We agree with the circuit judge that there was no competent testimony offered that when the resolution was passed the township had a population of 1,000 people. This makes it unnecessary to pass upon the question of whether the population must be shown by the last official census. It also makes it unnecessary to pass upon the question of whether the judge was right in what he said in relation to police protection.

3. Did the court err when it recalled the jury and

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after making inquiries again instructed them to bring in a verdict of guilty? Counsel say:

"When a trial court goes further, and on his own motion recalls the jury, and says among other things: 'I should think that you would have no difficulty in at once reaching a conclusion that the defendant was guilty.' 'In criminal cases the jury, however, must finally pass upon the question.' 'You may retire'—then we contend that the verdict became that of the court, and defendant's constitutional right to a trial by jury was denied. *People* v. *North,* 153 Mich. 612 [117 N. W. 63]; *People* v. *Doyle,* 160 Mich. 423 [125 N. W. 358]."

In the case at bar the facts are not in dispute. They were admitted by respondent. The jury retired to the jury room before bringing in their verdict. The cases cited, so far as they are applicable at all, sustain the action of the trial judge.

4. Did the judge err in declining to give defendant's requests to charge? Counsel say:

"Now, if the defendant acted in good faith and honestly thought he had the right to keep his saloon open until 11 o'clock in the evening, then he had no intention of violating the law, and the question of good faith and criminal intent were questions which should have been submitted to the jury, and defendant's first and second requests should have been submitted to the jury; and the court's refusal to give these requests, we insist, is error."

This contention is not sustained by the rulings of this court. In cases of this nature good faith is not a defense to illegal sales of intoxicating liquors. *People* v. *Roby,* 52 Mich. 577 (18 N. W. 365, 50 Am. Rep. 270); *People* v. *Blake,* 52 Mich. 566 (18 N. W. 360); *People* v. *Minter,* 59 Mich. 557 (26 N. W. 701); *Wolcott* v. *Judge of Superior Court,* 112 Mich. 311 (70 N. W. 831); *People* v. *Snowberger,* 113 Mich. 86 (71 N. W. 497, 67 Am. St. Rep. 449); *People* v.

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Gordon, 156 Mich. 237 (120 N. W. 578, 21 L. R. A. [N. S.] 136). We find no reversible error.

The case is affirmed and will be remanded for further proceedings.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

SNARSKI *v.* MONTREAL MINING CO.

MASTER AND SERVANT—MINES AND MINING—EXPLOSIVES—CONTRIBUTORY NEGLIGENCE.

Evidence that plaintiff, a miner, in defendant's employ, having upwards of eight years' experience, exploded certain blasts which he had prepared and thereupon returned to the place where he had been working, when one of the charges which had not been discharged exploded and injured him, warranted the court in directing a verdict for defendant on the ground of contributory negligence.

Error to Gogebic; Cooper, J. Submitted April 24, 1913. (Docket No. 39.) Decided September 30, 1913.

Case by Joseph Snarski against the Montreal Mining Company for personal injuries. Judgment for defendant upon a directed verdict. Plaintiff brings erorr. Affirmed.

Le Gendre & Driscoll, for appellant.

Belmont Waples and *William F. Shea,* for appellee.

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MOORE, J. Plaintiff, 28 years of age, a miner by occupation, was injured while working for the defendant in its Montreal iron mine in Wisconsin; his right leg being broken near the knee. He brought this action to recover damages for his injuries. He was the only witness. At the close of his testimony the judge directed a verdict in favor of the defendant. The case is brought here by writ of error.

The important question is: Did the judge err in directing a verdict? The mine has 22 levels, about 100 feet apart. Shafts 3 and 4 are about 2,300 feet apart. In the twentieth level, about 1,500 feet east of shaft No. 3, was cross-cut No. 30. About 20 feet below the twentieth level and running parallel with it was a subway, which extended about 20 feet east of cross-cut No. 30, and also about 1,300 feet west of it. In the twentieth level was a heavy door about 20 feet east of cross-cut No. 30, and another one about 120 feet east of the cross-cut. The twentieth level was about 12 feet wide and 9 feet high. The subway was 9 feet wide and 8 feet high. The men who worked below the twentieth level found their way down through a raise several hundred feet west of cross-cut 30. This raise was commencing to cave, and plaintiff was at work making a new raise at cross-cut 30. This raise was in ore. The plaintiff was at work with Tony Snarski. At this time two miners by the name of Rosenberg were mining in the east end of the subway. The plaintiff had worked for defendant 9 years.

The foregoing is a general statement of the situation, and we may now consider the material parts of the testimony of plaintiff:

"They used explosives in the mine (dynamite), which they exploded by means of fuse and the light of a lamp. They bore holes, and after they load those holes up, then they are supposed to notify one another before they blast. The miners used explosives in

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mining the ore. They have got to blast to loosen the dirt. I have used explosives for about 7 years. I know what should be done in regard to warning people when one or more blasts are about to be set off. When one or more blasts are about to be set off at a certain place, after we have got our holes charged and ready to blast, we are supposed to notify the others that we are going to blast so many holes. I mean we would tell them that the blast was about to occur, and also the number of holes that were going to be blasted. This is the customary way of doing it. The purpose of giving such notice is that we would neither injure one another nor kill one another. The way such notice is usually and customarily given is that one of us stays there, and the other partner goes and notifies the rest that is around there that he is going to blast and there is so many holes. As to how far around the place where the blast is about to occur that the people are notified, sometimes we go as far as 300 or 400 feet, and sometimes as far as 500 feet. I used dynamite myself on the day I was hurt. I blasted five holes in making room for the set which I have mentioned. When I had the five holes charged, the shift boss told us to blast them before the other men that was on the west side came in. If the shift boss hadn't ordered us to blast, we would have to wait until all of those men passed by. We blasted at the time we were ordered to by the shift boss. When we got orders to blast, we cut the fuse and hollered down. About 20 feet below there was a couple of men working there. I hollered myself three times that we were going to blast. My partner went west on the twentieth level into the twenty-fourth cross-cut.

"*Q.* Where did you go?

"*A.* There is a door made there for the draft, and I went back of that door, on the east side of the door, which was made of 3-inch plank, and was about 6 inches thick, and was doubled. That was in the twentieth level.

"*Q.* What did you go over there for?

"*A.* I went there to see that nobody came back that way. The boss was in that direction; maybe he would turn back, or something like that.

"*Q.* What did you do after you got there on the east side of that door?

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"*A.* I went there, and I was about 100 feet away from the door, and I waited for the blast. I stood there and I listened, and I heard five of them shots go off. I thought it was the five holes that I had. I asked the rest of the men around there, and they said they weren't going to blast. I asked them at the noon hour. There was two pipes going down there. One of them was about from 60 to 100 feet long, and the other one was longer. I put in two laggings alongside of those pipes, so that there wouldn't be any damage before we blasted. Those two men that I asked if they were going to blast were miners. * * * After I heard those five blasts, I opened the door and went on the other side of the door, from the east to the west. I went there to shut off the wind—the air. The pipes had broke and the air was coming through. All these men were standing west, and the pipes was broke. My partner was there, too, and the people wanted to pass by. These people who wanted to pass by were standing in the twenty-fourth cross-cut west of the place where the blast occurred.

"*Q.* What happened when you went to fix the pipes?

"*A.* There was one more explosion from these five holes what I charged and one of the others.

"*Q.* Where did the other holes explode?

"*A.* That was 20 feet below me in the first sub. The miners set those off. I didn't have any notice or warning that any blasts were going to be set off there. I wouldn't have gone in there to fix the pipes at that time, if I had had notice that there was going to be blasts down there. The air compressor, which is on the surface, brings that air in there that was in those pipes. * * *"

Cross-examination (by Mr. Shea):

"I have been working in the mine a good many years—about 8 years; not much in Michigan, for this same company, the Montreal company. During those 8 years I have been a miner in the Montreal mine all of the time. In this Montreal mine I have spoken about No. 3 shaft, and I say that the place at which I was at work on the morning I was hurt was about 1,500 feet east of shaft No. 3. * * * I set off those blasts at No. 30 cross-cut. That wasn't a cross-

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cut; it was a raise. * * * I helped to open up the raise all the way from the twenty-first level to the twentieth.

"*Q.* Were you blasting out the roof of that raise that morning?

"*A.* I was blasting the same as a cross-cut. I was blasting from the twentieth level towards the raise, on the hanging, north. The drift ran east and west, and I was opening up the cross-cut north. The raise was opened up as high as the twentieth level. It was opened up higher than the floor of the twentieth level above. The raise was about 4 feet from the north side of the twentieth level. We were cutting through that wall about 4 feet thick from the twentieth level to the raise, but the raise is through. * * *

"*Q.* What did you do during the night?

"*A.* First, when I got there, there was some dirt to be cleaned up, and we cleaned that up. Then we set our machine there and started to drill holes at the cross-cut. I started to drill these holes about 11 o'clock, and finished them about 4 o'clock. There were five holes. Two holes were about 2½ feet deep (that was all that was necessary), and the others were about 3½ or 4 feet. * * *

"*Q.* What were you doing from 4 o'clock, when you finished drilling the holes, until the time that the shift boss told you to blast?

"*A.* I took the machine and carried it away, and all the tools that was there I brought them away from the place where we were working, getting ready for the blast. * * *

"*Q.* And two men were working there in the subway that night?

"*A.* Yes, sir; their names are Victor Rosenberg and Frank Rosenberg—two brothers. That sub was 20 feet below the twentieth level. * * *

"*Q.* You say it was customary before setting off a blast to give warning. Did those two men give any warning that night that they were to set off a blast?

"*A.* No.

"*Q.* Why should they give any warning?

"*A.* Because they should give a warning so that one wouldn't hurt the other through a blast, or kill one another. There would be danger anybody would

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be hurt or killed who was in a drift above or below; there is danger. * * *

"*Q.* How many minutes warning is given before a blast?

"*A.* At least 5 minutes before he lights the fuse. When the shift boss told us to set off the blast that morning, nobody was present except Tony Snarski and myself. I gave warning that I was going to set off the blast to the men down below in the sub. I gave them warning right where that hole was—cross-cut 30. I halloed to them some 5 minutes before we lighted the fuse—fully 5 minutes. We men in the mine always did that.

"*Q.* All miners know that, even if the shift boss doesn't tell them, do they not?

"*A.* Yes; they are supposed to. Miners have been doing that for the last 8 or 9 years, ever since I have worked in the Montreal mine.

"*Q.* Anybody would know that it would be very dangerous to set off those blasts without giving warning to the men in that neighborhood?

"*A.* Yes, sir; everybody is supposed to notify one another. * * *

"*Q.* And they always did that in the Montreal mine as long as you worked there?

"*A.* I don't know whether they all do it or not. So far as I know, and where I worked, they did. What the rest of them did, I couldn't say. So far as I know, they always did it. But the men in the first sub didn't do it that morning. They didn't say nothing. They neglected their duty that morning.

"*Q.* If they had given you this warning, you would not have been hurt?

"*A.* No, sir; if I had had warning. I never talked to either of those men about the accident afterwards. The fuses that I used that morning were about 4 feet long. The five fuses were of the same length. I didn't light them all at the same time. I couldn't light them all at once, but I lit them one at a time.

"*Q.* How much time elapsed between the lighting of any two of the fuses?

"*A.* Well, it don't take no time at all. He just cuts his fuse first; he lights one and grabs the other and lights that; he lights one after the other.

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"*Q.* If they were all lighted at the same time, would there be any danger?

"*A.* No; you couldn't do it that way, no way, because you wouldn't know how many blasts would go, if they all went at the same time. We intentionally let a little time elapse between the lighting of any two fuses; the difference would be about 5 minutes in five fuses.

"*Q.* Do you mean a minute between each two?

"*A.* Five minutes between them all.

"*Q.* So that about 5 minutes would elapse between the first blast and the last blast?

"*A.* No, sir.

"*Q.* Five minutes between each two shots?

"*A.* It takes about one minute between five; that is, to light the five. Then they go off in rapid succession, so we can count them easy, one after the other.

"*Q.* Do two go off at the same time sometimes?

"*A.* No, sir.

"*Q.* Is there some difference in the rapidity with which the fuses burn? Will one fuse burn faster than the others sometimes?

"*A.* We make the fuses all alike when we start, and then when I go to light them I cut them probably half an inch or an inch. I cut them into different lengths, so that when I light the longest one it gives it so much time on the last one, and when I light the last one they all correspond.

"*Q.* If the fuse is 4 feet in length, how much time elapses between the lighting of the fuse and the explosion?

"*A.* So far as I understand it, and what the orders are, each foot will last one minute; but they don't go that.

"*Q.* You mean that the fuse burns faster than that?

"*A.* Yes; sometimes they do, a little bit faster than that. This morning, when we lighted the fuses, Tony Snarski went west and I went east back of the door. * * * I closed both doors as I passed east, and then I was about 150 feet from the cross-cut, and I stood there waiting for the explosions, and I counted five explosions. There was an air pipe in the drift, and the air was escaping from this pipe. * * * The pipe was broken at the cross-cut. I could tell the

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pipe was broken as I stood behind this door awaiting the explosions. It is easy telling, because the escape of the wind makes a great noise. I heard the sound. * * *

"*Q.* You didn't know at what point in the air pipe the break occurred?

"*A.* I knew it was in the drift where I blasted. The pipe was right in the center of the main drift, above. After the five explosions, and when I got my light, I started back to find out where the pipe was broken. I went back to see what pipe busted, and in going back I was hurt. On the way going back to see, I was hurt.

"*Q.* Where were you when you were hurt? * * *

"*A.* I went through both doors. I just got through the first door from where I blasted, and that is where I got hurt. I was about 50 feet east of cross-cut 30 when I got hurt.

"*Q.* Were you examining that pipe overhead?

"*A.* Yes; the height of that pipe from the floor was about 6 feet. My height is over 5 feet, something like that; about 5 feet 6 or 7 inches. I didn't have a light in my hand examining the pipe as I went west. I had my light in my hat, as they always carry it. I just opened the door and got through it.

"*Q.* Explain to the jury how you were examining the pipe.

"*A.* Just as I opened the door and wanted to start off, I was hurt. I didn't discover where the air was escaping from the pipe, because I was knocked down. * * *

"*Q.* About how long was it from the last explosion to the time you were hurt?

"*A.* I would judge it took 4 or 5 minutes before I lit my lamp and got down that far. The smoke usually clears away as rapidly as that. When they blast holes, and they get a draft, it clears in no time.

"*Q.* What did you expect to do upon reaching the place where the pipe was broken?

"*A.* I had to go to see, and stop or turn off that air; shut off the air. * * * At the time I was injured it was my intention to go to cross-cut 24 and shut off the air in that pipe. I understood there were several men west of cross-cut 30 in the twentieth level at that

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time. I understood that Tony Snarski went back to cross-cut 24. This pipe was closer by.

"*Q.* Couldn't he have turned off the air much more readily than you?

"*A.* I don't know whether he heard it. He was standing farther away from me. I don't know that the men at cross-cut 24 could have heard the air escaping from the pipe at cross-cut 30. They may have heard it, and maybe they didn't. * * * The two Rosenbergs were mining there, working with a machine, at that time. I heard some explosions in that sub about midnight that night; before dinner; before midnight. I don't know how many blasts were set off in that sub before midnight. I didn't count them, but they didn't go over eight or nine holes; I mean eight or nine holes at one blast.

"*Q.* Were several blasts set off in the sub before midnight?

"*A.* I didn't count them. I don't know whether or not there were several blasts set off in that sub before midnight. I didn't count nobody's holes. There was no blasting done in any other place near us that night before midnight; not close by. I heard the sound of an explosion after midnight, but it was far away; not just one blast; more than one; because the Montreal blasts probably every minute. I couldn't hear all the blasts where I was in the twentieth level, because I was working here, and they were far away. I heard blasts after midnight that night up to the time we set off our charges.

"*Q.* If you were in the twentieth level, could you tell whether a blast, the report of which you heard, was set off in the sub or on the level?

"*A.* Yes; I could tell. I could tell by the sound.

"*Q.* Could any miner—any man who had had any experience in mining—distinguish between an explosion in the sub and an explosion at cross-cut 30 on the level if he were standing on the level at cross-cut 30?

"*A.* Yes; a miner working in the mine he had ought to.

"*Q.* Suppose a man stood at the second door as you go east from cross-cut 30, and a blast was set off in the sub, and suppose another blast a few minutes later was set off in the cross-cut; if he were still standing

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at this door, how could he tell which blast took place in the sub and which in the level or drift?

"*A.* In a place like I worked, and those two men below, you couldn't tell much difference, because that hole takes the sound.

"*Q.* You mean the hole at cross-cut 30?

"*A.* Yes; so it makes pretty near the same sound. There ain't no difference. You could not tell the difference in that case. I couldn't tell the difference between my holes that I blasted and his."

Defendant moved for direction of a verdict on substantially the following grounds:

(1) Want of evidence of negligence on defendant's part.
(2) The Rosenbergs and plaintiff were fellow-servants, and their failure to give warning was fellow-servants' negligence.
(3) Plaintiff assumed the risk.
(4) Contributory negligence.

It is argued very strenuously that none of the reasons given in the motion for a directed verdict existed in this case. Taking plaintiff's version of the affair, we have the following situation: The plaintiff is a miner with eight or nine years' experience handling the dangerous explosive known as dynamite. He and his partner are at work just above two miners who are at work in ore, who also use dynamite to blast. It is understood by all of them that before a blast is made notice shall be given by hallooing to those likely to be affected. The plaintiff and his partner drilled the holes and put in the dynamite; the plaintiff preparing the fuses and then sending his partner to give the warning. He then lights the fuses and retreats to a place of safety. He hears explosions and counts them. He then assumes all of the charges he has prepared have gone off, and goes from a place of safety to a place of danger, when one of the charges of dynamite he has himself prepared, and to which he has attached a fuse for the purpose of exploding

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it, explodes, and he is hurt as the result of that explosion. Who contributed to this injury? Is it the defendant, who has instructed all the miners they must not set off a blast without warning, or is it the man who prepared the charge and attached the fuse and did not wait in a place of safety before going into a place of danger long enough to allow the fuse, which he had himself prepared, to do its work? When the facts are stated, such a situation is shown that the conclusion is irresistible that the conduct of plaintiff was not that of a reasonably prudent man; but it was conduct without which the accident could not have happened.

It will not be necessary to argue the other reasons for directing a verdict.

Judgment is affirmed.

STEERE, C. J., and MCALVAY, BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred.

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ABBOTT VOTING MACHINES—See MUNICIPAL CORPORATIONS (1).

ABSENCE OF COURT—See TRIAL (1, 2).

ACCEPTANCE—See CONTRACTS (1).

ACCORD AND SATISFACTION—See CONTRACTS (2).

ACCOUNTING.

1. The right to an accounting in equity is incident to most trust relations, and is not cut off by waiver of an answer under oath. *Excelsior Wrapper Co.* v. *Yund*, 373.

2. The mere existence of the relation of principal and agent, without peculiar and qualifying conditions, does not confer jurisdiction in chancery, but if lengthy or complicated accounts exist, or a discovery is required or trust relations are involved, a bill for accounting lies: defendant occupied the relation of a *quasi* trustee, as to funds intrusted to him to purchase materials, and the bill for an accounting was correctly sustained, on demurrer. *Id.*

See EQUITY (5); EVIDENCE (7); PARTNERSHIP (1, 2).

ACTION—See DAMAGES (7); RAILROADS (1).

ACT OF GOD—See CARRIERS (3).

ADEQUATE REMEDY AT LAW—See EQUITY (2, 5, 6).

ADJOINING LANDOWNERS.

1. In excavating near the boundary line of his premises, a proprietor must take reasonable precautions to prevent the falling of adjacent property, because of the removal of lateral support. *Bissell* v. *Ford*, 64.

2. He is liable for injury to the real estate even if he takes precautions such as are necessary and reasonable, but is not liable for damages caused to any superstructure. *Id.*

3. If the pressure of the superstructure causes the land to fall, no liability arises from damages to either, but if he fails to take such reasonable precautions to protect his neighbor's realty and preserve it in a natural state, one who removes the lateral support is liable for injury to both land and buildings if the negligence was the proximate cause of the fall, and not the pressure or weight of the building. *Id.*

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ADJOINING LANDOWNERS—Continued.

4. It was a question of fact for the jury in a suit by the owner of a building for damage caused by excavating on adjoining premises, whether defendant's contractor exercised reasonable care in causing several caissons to be sunk from 65 to 114 feet, removing 45 per cent. of the soil in the belt included by the pits, which were across a 20-foot alley from the injured structure, and in leaving the openings exposed for several weeks; testimony of experts being offered to show that the method pursued was improper. *Id.*

5. Whether due care was used in ascertaining the character of the soil through which the excavation was required to extend, in order to protect an adjacent office building, was also a question of fact upon testimony showing that a proper and careful exploration would have disclosed that a body of salt water lay between the surface and bed rock, rendering the sinking of caissons to the rock impracticable. *Id.*

6. Defendants could not be required to have on hand equipment sufficient to care for the large body of water which they unexpectedly encountered at a depth of 90 to 115 feet, as that would be to demand extraordinary precautions, but the jury was rightly permitted to say whether a reasonable effort was made to dispose of the water after it appeared. *Id.* 65.

7. For injury done by the negligence of a contractor working independently of the owner's control, he would not be held responsible unless the work was inherently dangerous. *Id.*

8. Evidence that the pressure of soil on the lagging or supports in certain pits caused the supports to bulge in the direction in which the slipping or movement occurred was competent; also, testimony should not have been excluded that some space was necessarily left between the earth and lagging. *Id.*

9. While testimony of experts that, even with employment of a high degree of care, adjoining buildings are more or less affected, was properly received, the court erred in receiving evidence that in specific instances similar difficulties were encountered in constructing buildings specifically referred to. *Id.* 66.

10. Damages might properly be based on the rentals or receipts from the building that stood on the premises affected by the defendant's negligent excavation, regardless of the worth of the real estate for other purposes. *Id.*

See MASTER AND SERVANT (1).

ADMISSIONS—See CRIMINAL LAW (24); EVIDENCE (1); FRAUD (3).

ADULTERY—See DIVORCE (3).

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ADVERSE POSSESSION—See PRESCRIPTION.

ADVERTISING MATTER—See CRIMINAL LAW (17, 19, 20).

ADVICE OF COUNSEL AS PROTECTION—See MALICIOUS PROSECUTION (2).

AFFIDAVIT—See AMENDMENTS (2); CONTINUANCE; INJUNCTION (1); JUSTICES OF THE PEACE (5); PROCESS (1).

AFFIRMATIVE DEFENSE—See CARRIERS (3).

AGENCY—See PRINCIPAL AND AGENT.

ALLEYS AND STREETS—See PRESCRIPTION (1, 2).

AMENDMENTS.

1. Where plaintiff charged in his declaration that defendant, after fraudulently inducing plaintiff to withhold from record a chattel mortgage on defendant's property, transferred his property to a partnership of which defendant was a member, and it appeared on the trial that there was a bill of sale by defendant to one H., who conveyed the mortgaged property to the partnership, the court did not err in amending the declaration so as to show the facts: the amendment did not state a new cause of action. *Priebisch* v. *Ottenwess*, 477.

2. Nor did it so change the scope of the action as to amount to a variance between the declaration and the affidavit for a capias in the cause. *Id.*

See JUSTICES OF THE PEACE (2).

ANIMALS—See SALES (1).

ANSWER—See INJUNCTION (2).

APPEAL AND ERROR.

1. In order to review improper argument of the prosecuting attorney it is essential to secure a ruling of the trial court. *People* v. *Auerbach*, 24.

2. The court, on error, will not review the refusal to give requested instructions, the subject of which is covered by the general charge, or objections to the introduction of evidence admitted without exception and properly raised for the first time on motion for a new trial. *Id.* 25.

3. In order to review alleged objectionable argument of the prosecuting attorney, in a criminal case, it is essential to make objection and obtain a ruling of the court. *People* v. *Danenberg*, 337.

4. On its own motion this court will dismiss an appeal in divorce proceedings taken nearly two years after the entry of a decree, notwithstanding the subsequent filing of a petition for rehearing, denied by the circuit court. Jurisdiction of the Supreme Court in chancery appeals

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APPEAL AND ERROR—Continued.

is limited to the maximum period fixed by statute and court rules. *Foster* v. *Foster*, 379.

5. On appeal from a decree of divorce granted for extreme cruelty, this court will not consider an objection to the sufficiency of the averments of the bill that was not raised in the lower court. *Brayton* v. *Brayton*, 454.

6. The court, on error, will not consider the refusal of the trial judge to strike out testimony, when the appellant does not discuss the subject in his brief, or refer to any exception to the ruling. *Priebisch* v. *Ottenwess*, 477.

7. An exception is required to review the refusal of the trial court to direct a verdict for defendant. *Id.*

8. In the absence of a motion for a directed verdict or any objection to the evidence, on the ground that there was a variance between the declaration and proofs, the point will not be considered on writ of error. *Moilanen* v. *Washington Iron Co.*, 505.

9. A verdict will not be set aside on error if the contention of the prevailing party was supported by affirmative testimony which, if the jury believed it, would sustain the finding. *Id.*

10. The court will not undertake to perform the duty devolving on counsel for appellant to make a clear and concise statement of the errors relied upon, the questions involved, and the manner in which they are raised, as required by Supreme Court Rule 40. *Keenan* v. *City of Mount Pleasant*, 621.

See CRIMINAL LAW (22); DIVORCE (2); ESTATES OF DECEDENTS; TRIAL (3); VENUE (1).

APPEARANCE—See GARNISHMENT; JUSTICES OF THE PEACE (1, 4, 5).

APPLICATION OF PAYMENT—See EVIDENCE (17).

APPOINTMENT TO OFFICE—See MUNICIPAL CORPORATIONS (4).

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ARREST—See PROCESS (1).

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ASSIGNMENTS FOR BENEFIT OF CREDITORS—See TRUSTS.

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ASSUMPTION OF RISK—See MASTER AND SERVANT (2, 6, 10).

ATTORNEY AND CLIENT—See COSTS; MUNICIPAL CORPORATIONS (4, 5); PARTNERSHIP (6).

ATTORNEY GENERAL—See INTOXICATING LIQUORS (12).

BAGGAGE—See CARRIERS (1-3).

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BENEFICIAL ASSOCIATIONS—See INSURANCE (3, 4).

BILL OF REVIEW—See DIVORCE (1-3).

BILLS AND NOTES—See MUNICIPAL CORPORATIONS (1).

BOOKS OF ACCOUNT—See EVIDENCE (7-9).

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BREACH OF CONTRACT—See CANCELLATION OF INSTRUMENTS (1); CONTRACTS (4); DAMAGES (2, 3); MASTER AND SERVANT (8); PLEADING (2, 3).

BREAKING AND ENTERING—See CRIMINAL LAW (14).

BRIEF OF APPELLANT—See APPEAL AND ERROR (10).

BROKERS.

1. Where a broker advised the owner of hotel property that he had a prospective buyer, asking about price and terms, and naming the party, and the owner telegraphed giving the price and stating that he had six buyers, later stating by letter his terms and closing with the broker's offer of $38,000 for the property, upon commission of $1,000, and where the broker arranged with other purchasers to take the hotel property through a deed to and in the name of the one purchaser mentioned, who was to execute a quit-claim deed to the parties in interest, the broker was entitled to recover his commission, although the sale could not be completed because the property became involved in litigation so that the owner could not convey a clear title. *Harger* v. *Watson*, 192.

2. The broker's duty is performed when he has found a purchaser that is ready, willing, and able to purchase upon the terms specified, and his right to commissions is not defeated if the title proves to be defective or unmerchantable. *Id.* 193.

See EVIDENCE (7); INSOLVENCY (1); INTERPLEADER (2).

BUILDING AND CONSTRUCTION—See ADJOINING LANDOWNERS (5).

BUILDING CONTRACTS—See CONTRACTS (1, 2).

BUILDING RESTRICTIONS—See COVENANTS; DEEDS (5, 6).

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BURDEN OF PROOF—See CARRIERS (3); DEEDS (3); EVIDENCE (16, 17); INSURANCE (1); TAXATION (5).

CANCELLATION OF INSTRUMENTS.

1. Where defendant and her deceased husband executed a contract in writing to provide support and care to his parents, and in consideration thereof the parents executed a deed of an eighty-acre farm to the son and wife, who failed to carry out the arrangement, and defendant's evidence tended to show an oral agreement to apply the proceeds of certain real estate which complainant purposed to sell towards the construction of a house on the farm, the decree of the circuit court finding against the alleged oral contract was justified: proof of the subsequent oral contract was inadmissible to modify the written instrument; and if it was not intended to change the contract, defendant's failure to perform and breach of the agreement to provide support was without justification. *Ebling* v. *Ebling*, 602.

2. *Held*, also, that the decree of the circuit judge based on improvements to the farm less its rental value and the value of certain personal property used by defendant and her deceased husband, and allowance for support to complainants, etc., was justified. *Id.*

See COMPETENCY; DEEDS (3); FRAUD (1, 2).

CANVASS OF VOTES—See ELECTIONS.

CAPACITY OF GRANTOR—See COMPETENCY.

CAPIAS AD RESPONDENDUM—See AMENDMENTS (2); PROCESS (1).

CAPITAL—See USURY (3).

CARRIERS.

1. A passenger, bringing action for loss of her baggage by fire, is entitled to show that she did not have a reasonable opportunity, after arriving at her destination, to procure it, and, without averments as to the particular facts in her declaration, which contains the general averment that plaintiff did not have a reasonable opportunity, may show that she attempted to get it, and was informed by the baggage man that he could not then attend to it, and that he closed and locked the station before she could find a conveyance to deliver the baggage. *Wallace* v. *Detroit, etc., R. Co.*, 128.

2. The strict rule of liability for baggage of passengers continues after arrival of the passenger at his destination and until the lapse of a reasonable time thereafter: what is a reasonable time is a question of fact for the jury if there is any dispute about the facts. *Id.*

3. Since the contention of a carrier that loss of plaintiff's baggage by fire was occasioned by lightning is an affirma-

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CARRIERS—Continued.

tive defense, the court properly denied a new trial on the question of the weight of evidence, upon conflicting testimony that would support a finding for either party. *Id.*

4. In selecting a place for passengers to alight, a street railway is bound to exercise reasonable care to stop the car at a safe place, and is liable if a passenger is required to alight at a point in a street where a sufficient defect or depression exists to render it unsafe. *Fuller* v. *Detroit United Ry.*, 135.

5. But a worn place in the pavement, not over three inches in depth and twelve inches in area, in which plaintiff fell, spraining her ankle, was not such a dangerous place as to charge defendant with liability for stopping the car and requiring plaintiff to alight at a point about one pace distant. *Id.*

CAUSE OF DEATH—See RAILROADS (5).

CAVEAT EMPTOR—See SALES (1).

CENSUS—See CRIMINAL LAW (23, 25); SCHOOLS AND SCHOOL DISTRICTS (1, 2).

CERTIORARI—See CONSTITUTIONAL LAW (3); JUSTICES OF THE PEACE (4).

CHAIN OF TITLE—See TAXATION (3).

CHANGE OF VENUE—See VENUE (1, 2).

CHARGE—See TRIAL (3).

CHATTEL MORTGAGES.

1. Under a chattel mortgage executed and filed in the State of Indiana, plaintiff commenced foreclosure of the property, a horse, by complaint: the case proceeded to judgment, which the mortgagor agreed to pay or to turn over the horse before a specified date. He did not surrender possession to plaintiff as agreed, but sold the mortgaged property, which was removed to Michigan, and was conveyed to defendant, a purchaser in good faith, without notice of the mortgage lien. The instrument was never filed in this State: it contained a clause authorizing the mortgagee to take possession of the horse in case of default, and thereupon it should become his absolute property. In the foreclosure proceedings a sale was held pursuant to the order of the court, and plaintiff bid in the horse. *Held*, that, since the purchaser in Michigan obtained title in good faith, plaintiff could not, after foreclosing, exercise his option and take possession under the mortgage, no evidence being produced to show what the law was in the State of Indiana. *Allison* v. *Teeters*, 216.

2. Persons dealing with the apparent owner of personal

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CHATTEL MORTGAGES—Continued.

property in Michigan are not required to consult the records in another State; without a transfer of the possession of mortgaged property, subsequent purchasers in good faith are not affected by the existence of a mortgage not recorded in this State. *Id.*

CIVIL DAMAGE ACT—See INTOXICATING LIQUORS (1-3).

CLOSING HOUR OF SALOON—See CRIMINAL LAW (23-25).

COMMISSIONERS ON CLAIMS—See ESTATES OF DECEDENTS.

COMMISSIONS—See BROKERS (1); INTERPLEADER (2).

COMMON COUNTS—See PLEADING (2).

COMPENSATION OF VILLAGE ATTORNEY—See MUNICIPAL CORPORATIONS (5).

COMPETENCY.

Evidence tending to prove that decedent executed deeds of all his real property to his son, excluding his daughter from any share in his estate, at a time when he had become enfeebled by illness, that he had failed rapidly after the death of his wife and prior to the making of the deeds, that his memory was impaired but he was capable of transacting business understandingly and was active mentally, and well preserved both mentally and physically at the age of 85, *held*, insufficient to invalidate the transfers. *Reagan* v. *Murray*, 231.

See DEEDS (1, 3, 4); EVIDENCE (5).

COMPROMISE AND SETTLEMENT.

In a suit to vacate a compromise of complainant's interest in an estate of her grandfather, on the ground that she was defrauded or mistaken as to the value of the interest which she was entitled to, evidence that her solicitors had, previously to the compromise, advised her in relation to her rights, and the extent of decedent's estate, refuted her claim of ignorance and of fraud practiced by defendants. *Van Syckle* v. *Thompson*, 112.

See DIVORCE (3); EQUITY (4); ESTOPPEL (2); FRAUD (4); TAXATION (2).

CONCLUSIONS—See EVIDENCE (11).

CONDITIONS PRECEDENT—See WILLS (3, 4).

CONDUCT OF COURT—See TRIAL (1, 2).

CONDUCT OF PROSECUTOR—See APPEAL AND ERROR (1).

CONSIDERATION—See CONTRACTS (6).

CONSIDERATION, FAILURE OF—See CANCELLATION OF INSTRUMENTS (1).

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CONSPIRACY—See CRIMINAL LAW (13); HOMICIDE (1).

CONSTITUTIONAL LAW.

1. Act No. 62, Pub. Acts 1911, is valid and constitutional, and the court should give effect to the legislative purpose by so construing the language as not to render it invalid. *People v. Kennedy*, 386.

2. Act No. 307, Pub. Acts 1909 (5 How. Stat. [2d Ed.] § 12865), granting to either party the right to call as a witness the opposite party, his agent, or employee, or any one who may have been such agent or employee at the time of the transaction in question and permitting cross-examination, etc., does not deny a defendant the equal protection of the laws. *Maki* v. *Mohawk Mining Co.*, 497.

3. Certiorari does not lie to review the determination of the governor of the State removing from office the mayor of Traverse City, in proceedings under 1 Comp. Laws, § 1159 (1 How. Stat. [2d Ed.] § 1310). To permit judicial review of such removal proceedings in an action directly against the governor would invade the functions of the executive department and violate the Constitution, art. 4, §§ 1, 2. *Germaine* v. *Governor*, 585.

4. It is not important in Michigan whether the act of the executive is ministerial or judicial in its nature; the judicial department is not authorized to interfere with the determination of a co-ordinate branch of the government, although the courts may exercise jurisdiction to pass upon the validity of the proceedings in a cause arising between private parties claiming rights thereunder. *Id.*

See CRIMINAL LAW (1).

CONSTRUCTION OF MORTGAGES—See USURY (2).

CONSTRUCTION OF STATUTES—See STATUTES (1); USURY (6).

CONTINUANCE.

An affidavit for continuance, on the ground that a material witness is absent from the jurisdiction, is not met by a counter-affidavit in opposition thereto showing that the alleged absent witness is the husband of plaintiff, who does not consent to his giving testimony against her; since the husband's testimony may be competent within the exceptions of 3 Comp. Laws, § 10213 (5 How. Stat. [2d Ed.] § 12857). *Snyder* v. *Berrien Circuit Judge*, 546.

CONTRACTS.

1. The owner of a building in process of construction, who is compelled by the expiration of a lease held by him to occupy the premises before the work has been completed

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CONTRACTS—Continued.

as required by his contract with the builder, does not thereby accept the building. *Japes* v. *Harmon*, 1.

2. Where defendant, in an action to recover a claimed balance due on a building contract, produced testimony to show that certain work and materials furnished were defective and the contractor had received his final certificate from the architect as payment in full, the amount remaining to be held by the owner to cover the cost of replacing the work objected to, it was not error to admit evidence of the contractor's agreement to accept such certificate in full satisfaction, and the court correctly instructed the jury that, in the absence of a denial by such contractor as to the alleged settlement, he could not recover. *Id.*

3. Where complainant made a sale of his retail fur business, under contract to discontinue the use of his name on request and 60 days' notice, defendants were not entitled to dissolve the original corporation doing business under complainant's name, and organize another to continue the business and adopt the name: the attempted evasion of the terms of the agreement was fraudulent and should be enjoined. *George* v. *Rollins*, 145.

4. Where no opportunity was afforded by defendant to plaintiff to fulfill a contract to deliver gravel which defendant claimed plaintiff failed to perform, and defendant made no demand for performance, he was not entitled to recoup damages for an alleged breach, in an action for a balance remaining unpaid under the agreement. *Detroit River Transit Co.* v. *Aldrich*, 357.

5. Nor could defendant recover a voluntary payment made to one of plaintiff's employees as a gratuity or bonus for expediting the delivery of the gravel. *Id.*

6. In a proceeding to enforce a claim against the estate of a decedent, who had received property from his father subject to the debts of the latter, a letter written by the son promising to pay debts created after the execution of the trust deed was improperly received in evidence, in the absence of testimony that claimant promised to forbear collecting his claim against the father, or granted any extension or favor in consideration of decedent's assuming the debt. *In re Dubois' Estate*, 407.

7. An advertisement offering a reward of $1,000 "for the arrest and conviction" of a criminal, is to be construed not literally but substantially, so that persons who give information leading to the arrest of the offender and resulting in his conviction by a court of competent jurisdiction are entitled to the fund. *Bloomfield* v. *Maloney*, 548.

8. Where one of the defendants, in an interpleader suit for the purpose of securing a reward offered, informed the officers that she knew the name of the offender, and gave

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CONTRACTS—Continued.

such information that the officer, with the aid of facts furnished by two other defendants, succeeded in identifying him and caused his arrest, whereupon he pleaded guilty, the defendants were entitled to have the reward divided among them in the proportions justified by the value of their services: one-half to the first informant, the other half to be equally divided between the other defendants. *Id.* 549.

See BROKERS (1); CORPORATIONS (2, 3); DAMAGES (2, 3); EQUITY (2); EVIDENCE (11, 12); INTERPLEADER (1, 2); LOGS AND LOGGING; MASTER AND SERVANT (8); MECHANICS' LIENS; MUNICIPAL CORPORATIONS (5); REFORMATION OF INSTRUMENTS; SALES (2, 3); SPECIFIC PERFORMANCE (1); USURY (2).

CONTRADICTORY INSTRUCTIONS—See TRIAL (3).

CONTRIBUTION—See LIFE ESTATES (1).

CONTRIBUTORY NEGLIGENCE—See MASTER AND SERVANT (3, 6, 10, 11, 13); PLEADING (1); RAILROADS (4); STREET RAILWAYS (1, 2, 4, 5).

CORPORATIONS.

1. While a subscriber to the capital stock of a corporation is generally bound by his subscription and may not escape liability by transferring his interest to a third party, no liability was established by evidence that defendant, in an action commenced by the trustee in bankruptcy of a corporation, became a subscriber to the stock before the completion of corporate organization for the purpose of accommodating the promoters, and with the understanding on the part of the other stockholders as well as of defendant that his subscriptions should create no liability, and, merely to provide the three required incorporators, signed the articles of association, resigning immediately thereafter as a director and disposing of his stock to a stockholder who had not been able to be present at the time of organization, that defendant supposed he had assigned all his stock, but by mistake retained one share, that defendant took no part in any proceedings after the articles were duly filed and no person dealt with the corporation in reliance on his ownership of stock. *Campbell v. Raven*, 208.

2. Evidence that the president of a corporation took charge of and conducted its business, made contracts and performed the duties of general manager, that all the officers and directors knew plaintiff had been employed to superintend the foundry, and knew of payments of salary that were made to plaintiff, supported the finding of the jury that the president was authorized to hire plaintiff. *Galvin v. Detroit Steering Wheel & Windshield Co.*, 569.

3. Whether or not the corporate organization was perfected

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CORPORATIONS—Continued.

before the execution of plaintiff's contract of employment, defendant was liable for services thereafter performed under the contract, its officers and directors having notice, and the parties having dealt with defendant as a corporation. *Id.*

See JUSTICES OF THE PEACE (1); MASTER AND SERVANT (8); PROCESS (2); TAXATION (2).

CORRESPONDENCE—See CRIMINAL LAW (6); EVIDENCE (13).

COSTS.

On mandamus proceedings to compel the president and clerk of a village to sign an order for the salary of an attorney, employed by the village, costs will be allowed only against the president who refused to sign the order, not as against the clerk who had signed it. *Ganeser* v. *Vanderveen*, 518.

COURT RULES—See NOTICE (1).

COURTS—See CONSTITUTIONAL LAW (3, 4).

COVENANTS.

1. Defendant obtained the title of Lot J subject to a restriction that the premises should be used only for residence purposes, and no residence should be erected thereon of less value than $2,500. He commenced the construction of what he claimed was a barn, but caused machinery to be moved in and commenced to use the structure for business and manufacturing purposes. Defendant had no horse or automobile; but contended that he expected in the immediate future to make certain alterations so as to change the alleged barn into a four-family flat. The decree of the circuit court required defendant to remove the building in 90 days. *Held*, that the decree was too broad and should be modified so as to permit defendant to complete the building for residence purposes, if he should elect so to do, to be worth when completed not less than $2,500. *Maine* v. *Mulliken*, 443.

2. Equitable jurisdiction to enforce covenants is not absolute, but is governed by the same general rules which control equitable relief by specific enforcement: if the restrictive covenants in a deed were made with evident reference to the continuance of the existing general condition of the property and its surroundings, but in the lapse of time there has been a complete change in the character of the neighborhood, so as to defeat the purposes of the covenants and to render their enforcement an inequitable and unjust burden on the owner of the lots, the equitable relief will be denied and complainant left to his legal remedy. *Moore* v. *Curry*, 456.

3. In a suit to enjoin defendants from erecting a store building on Woodward avenue, in the village of Highland

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COVENANTS—Continued.

Park, in violation of restrictions imposed when the property was placed upon the market, evidence *held*, to sustain a decree enforcing the restrictive covenants in the several conveyances, on the ground that the character of the district had not so materially changed as to make it inequitable to enjoin a breach of the restrictions. *Id.* 457.

See DEEDS (6).

CRIMINAL LAW.

1. Act No. 103, Pub. Acts 1903, which prohibits indecent or obscene exhibitions in museums or elsewhere, or the exhibition of deformed human beings, diseased or deformed human bodies, or parts or representations thereof, except for purely medical or for scientific purposes, is valid, and the second section of the act, relating to the exhibition of diseased parts of bodies, or representations of the same, which are indecent, is within the title of the act. *People* v. *Kennedy*, 15.

2. It was proper to deny a motion of respondents' attorneys to direct a verdict in their favor on the ground that the person who viewed the exhibition was not shown not to be a person who might lawfully view the exhibit within the exception of the statute which permitted exhibitions to medical students or practitioners; the evidence tending to show that the witness was a carpenter, employed in an automobile factory. *Id.* 16.

3. Defendants, who did not offer any requests to charge the jury as to the meaning of the words used in the act, "exhibition," "expose," or "exhibit," were not prejudiced by failure to charge as to the same, or by instructions to the jury that it was for the jury to say whether the exhibition was indecent, whether the respondents exhibited the objects in evidence for scientific purposes or before members of the medical profession, or of medical classes, and whether they were exposed or exhibited under the terms of the statute. *Id.*

4. The terms were used in the law in their usual or ordinary sense. *Id.*

5. A conversation held with one of the respondents after the witness had seen the display, tending to show his knowledge that the witness saw the exhibition, was not immaterial or prejudicial. *Id.*

6. Correspondence received by the accused relating to a proposed sale of the exhibit was properly excluded from the evidence as having no tendency to show that it was, in good faith, displayed for sale only. *Id.*

7. While the court, on a trial for murder, did not err in receiving proof that the accused had inquired of the sheriff whether the proceedings taken after death of the decedent would answer in place of a death certificate, immediately following a conversation with the wife of deceased, say-

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CRIMINAL LAW—Continued.

ing he understood there was heavy life insurance, evidence relating to the insurance and terms and amount thereof should have been struck out on respondent's motion based on the ground that no evidence had been presented showing that respondent knew before the killing of the insurance, which was payable to the wife of decedent. *People* v. *Auerbach*, 23.

8. Under 1 Comp. Laws, § 2563 (1 How. Stat. [2d Ed.] § 1160), the appointment of a special prosecutor by the trial court because he considered the prosecuting attorney disqualified, who acquiesced in the action of the judge and withdrew, was justified and it will be presumed that a sufficient inquiry was made to sustain the order. *Id.* 24.

9. It is within the discretion of the trial court to permit or refuse to permit experiments to be made in the presence of the jury. *Id.*

10. And in ruling out evidence of experiments made by a witness with a shotgun which was of different construction and size than the rifle of respondent, that discharged the fatal shot, the discretion of the court was properly exercised. *Id.*

11. A respondent may waive his right to attend a view of the premises in a criminal proceeding if he is at liberty and not prohibited by the court from attending, but the jury should not receive any evidence in his absence. *Id.*

12. The court should not have charged the jury as to the course of the bullet into the body of decedent that it passed through horizontally, when the evidence in behalf of the accused tended to show the contrary. *Id.*

13. And it was error to instruct the jury that the prosecution claimed the motive of the crime was respondent's infatuation with the wife of deceased, and their mutual understanding to murder him in order to realize on the life insurance, since the evidence supporting that contention should have been withdrawn from the consideration of the jury. *Id.* 25.

14. The time of committing the alleged offense of taking property from a boat in the daytime was not a question to be determined by the court, under evidence that tended to support the information. *People* v. *Danenburg*, 337.

15. It was not erroneous to permit the prosecution to question respondent, who took the stand in his own behalf, concerning his character, associations, and offenses committed subsequent to the crime alleged. *Id.*

16. Notwithstanding a want of evidence that specific acts of lewdness had been committed in the house conducted by respondent, between the dates charged in the information, which alleged that respondent kept a house of ill fame, a verdict finding her guilty was sustained by evidence of the bad character of the place, of the persons

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CRIMINAL LAW—Continued.

who resorted thereto, and respondent's admissions on the stand that she had conducted a house of prostitution at the place in question, and about two weeks before the time stated in the information had been arrested as a common prostitute and had pleaded guilty, and on her testimony that, during the period charged in the pleading, men had visited the house at a late hour and had gone to an upper room with one of the female inmates, remaining until about four o'clock in the morning. *People* v. *Martin*, 381.

17. An information based on Act No. 62, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5299), charging in the language of the first section of the statute that defendants did unlawfully advertise in a certain pamphlet annexed to the information "the treating and curing of venereal diseases, the restoration of lost manhood and lost vitality and vigor, which said advertisement contained expressions synonymous with the words 'lost manhood,' 'lost vitality and vigor,'" sufficiently apprised the defendants of the nature of the offense charged. *People* v. *Kennedy*, 384.

18. Matters included in the pamphlet that did not relate directly to the charge of the information might be treated as surplusage, and did not affect the validity of the pleading. *Id.*

19. It was proper to submit to the jury the letter offered in evidence, with instructions that it tended to show that the respondents proposed to send, for the purpose of distribution, certain pamphlets, and that the testimony tended to show that the pamphlets were received and distributed as charged, that the question whether the pamphlet violated the statutes was for the jury, and whether the language used was unlawful or synonymous with the prohibited phrases. *Id.* 385.

20. While the court might have instructed the jury that the advertising matter distributed by respondents was a violation of the law, the finding of the jury that the respondents were guilty determined the point against them, and the submission of the question was not prejudicial to appellants. *Id.*

21. The State could not be compelled to elect between two counts, one of which charged that respondents unlawfully advertised to treat and cure venereal diseases, etc., as set forth in a pamphlet annexed to the information, the other count alleging that the respondents advertised under their firm name that they were specialists in such diseases, as shown by said pamphlet. *Id.*

22. But where the prosecuting attorney elected to proceed under the first count, there was no ground of complaint. *Id.*

23. Testimony that the population of a township had increased since the last census, and that in the judgment

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CRIMINAL LAW—Continued.

of the witnesses, being officials and others, the population was more than 1,000 at the time the township board passed a resolution authorizing respondent to keep his saloon open until 11 p. m., was properly excluded in the absence of an actual enumeration of the inhabitants. *People* v. *Worges*, 685.

24. It was not error for the trial court to advise the jury, after they had been out some time, that they ought not to have any difficulty in reaching a verdict of guilty, but that they must pass on the question, permitting the jury to retire and bring in a verdict against respondent who had admitted the fact of keeping his saloon open after 9 p. m. *Id.*

25. The fact that a retail liquor dealer kept his saloon open after 9 p. m., relying in good faith on a resolution of the township board permitting him to remain open until 11 p. m., was no defense to a prosecution in which it was not proved that the population of the township, shown to have been 721 at the last census, had thereafter increased above 1,000. Act No. 291, Pub. Acts 1909, § 17 (2 How. Stat. [2d Ed.] § 5071). *Id.*

See APPEAL AND ERROR (2); CONSTITUTIONAL LAW (1); EVIDENCE (13); FORGERY; HOMICIDE (1, 2).

CROSS-BILL—See FRAUD (2).

CROSS-EXAMINATION—See CONSTITUTIONAL LAW (2); CRIMINAL LAW (15); EVIDENCE (3, 8); FRAUD (6).

CUSTOM—See STREET RAILWAYS (2).

DAMAGES.

1. When one has been injured in his property by the wrongful act of another, the claim for compensation cannot be successfully met by showing that if the injured property were devoted to other uses, the damage would be diminished. *Bissell* v. *Ford*, 66.

2. If parties agree upon a rule of damages to be followed in the event of a breach of the contract, no different rule or measure will be adopted by the court. *Twin City Creamery Co.* v. *Godfrey*, 109.

3. Under a contract providing for the installation of a refrigerating plant, which the vendor guaranteed to be free from imperfections for the space of one year, promising to replace defective parts, etc., and further providing that if the plant should not fulfill the conditions of the contract, the vendor should be allowed to enter the buyer's premises, upon repaying the money paid, and to remove the plant, no different measure of damages than such repayment and removal was contemplated, the vendee not being entitled to recover damages suffered by reason of defendant's failure to install a satisfactory refrigerating system. *Id.*

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DAMAGES—Continued.

4. The measure of damages, in trover, is the true cash value at the time and place of conversion, in the absence of testimony showing that the goods had a peculiar value to the owner. *Hautala* v. *Dover*, 367.

5. Upon defendant's testimony, uncontradicted, that the property converted was worth $300 at the time of conversion, four years after it had been purchased, and after it had had considerable usage, a verdict for $527.80 was without basis, and should have been set aside. *Id.*

6. Under 2 Comp. Laws, § 6309 (3 How. Stat. [2d Ed.] § 6664), providing that the amount recovered in an action for the killing of an intestate person shall be distributed to the persons and in the proportions provided in the law governing the distribution of personal property of intestates, a sister of decedent, whose father and mother were living at the date of decease, not being entitled to share in the estate, would not be entitled to consideration, although the surviving sister was an invalid, dependent on the decedent: the court committed prejudicial error in permitting the jury to base the damages awarded on the loss to father, mother, and sister. *Richardson* v. *Detroit & Mackinac R. Co.*, 414.

7. Plaintiff's right to recover was not defeated by the fact that decedent voluntarily contributed to the support of her infirm and aged parents, and that no steps had been taken to compel contribution under 2 Comp. Laws, § 4487 *et seq.* (2 How. Stat. [2d Ed.] § 3478 *et seq.*). *Id.*

8. Five thousand dollars damages for loss of two fingers and injuries partially disabling the others, *held*, too large, and reduced to three thousand dollars. *Moilanen* v. *Washington Iron Co.*, 506.

See ADJOINING LANDOWNERS (2, 3, 10); INTOXICATING LIQUORS (1-7).

DEATH—See RAILROADS (3, 5); STREET RAILWAYS (2).

DEATH ACT—See DAMAGES (6).

DEATH OF LICENSEE—See INTOXICATING LIQUORS (8).

DEBTOR AND CREDITOR—See EVIDENCE (7, 17); INSOLVENCY (2); PAYMENT.

DECREE—See CANCELLATION OF INSTRUMENTS (2); DIVORCE (5).

DEED AS MORTGAGE—See MORTGAGES (1).

DEEDS.

1. Evidence considered, and *held*, to sustain the finding of the circuit court that complainant executed a certain deed by reason of undue influence and mental incapacity. *Longenecker* v. *Graham*, 84.

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DEEDS—Continued.

2. *Held*, also that a contract ratifying the instrument made while the probate court had jurisdiction of a petition to adjudge the grantor incompetent, did not validate the deed, where a guardian was later appointed and continued to act until discharged by order of the probate court. *Id.*

3. The complainant, seeking to set aside voluntary deeds of a decedent, has the burden of proving a charge of incompetency by a preponderating evidence, so that evidence which does not prevail over defendant's testimony, or which is so evenly balanced as to leave the issue in doubt, will not sustain the claim of incapacity. *Reagan* v. *Murray*, 231.

4. *Held*, that the weight of the evidence sustained the capacity of defendant's grantor to make a disposition of his estate by deed. *Id.*

5. If a building on property subject to building restrictions is of the required value, and is used for the purposes mentioned, it is not in violation of the restriction because it may be unsightly or offensive to the taste, or because its erection may tend to render adjacent property less valuable. *Maine* v. *Mulliken*, 444.

6. Under restrictions contained in a deed prohibiting the erection of a saloon or store, or of any dwelling house of less value than $2,000, upon the premises conveyed, a duplex or two-family residence could not be constructed on the lot. *Kingston* v. *Busch*, 566.

See CANCELLATION OF INSTRUMENTS (1); COMPETENCY; COVENANTS (1, 2).

DE FACTO ORGANIZATION—See CORPORATIONS (3).

DEFENSE—See MUNICIPAL CORPORATIONS (8).

DEFENSES, NOTICE OF—See PLEADING (3).

DEMAND—See CONTRACTS (4).

DEMURRER—See EQUITY (1).

DESCENT AND DISTRIBUTION—See DAMAGES (6); WILLS (5).

DETROIT CHARTER COMMISSION—See MUNICIPAL CORPORATIONS (6, 7); PROHIBITION.

DEVISE IN RESTRAINT OF MARRIAGE—See WILLS (3).

DIRECTED VERDICT—See APPEAL AND ERROR (7); CRIMINAL LAW (2, 24); MASTER AND SERVANT (13).

DISCRETION—See DIVORCE (2, 3).

DISEASED ANIMALS—See SALES (1).

DISMISSAL AND NONSUIT—See DIVORCE (4-6).

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DISORDERLY HOUSE—See CRIMINAL LAW (16).

DISSOLUTION—See INJUNCTION (2); PARTNERSHIP (5).

DIVORCE.

1. On the ground of newly discovered evidence, complainant in divorce proceedings is entitled to present a petition for leave to file a bill of review more than one year after the entry of an adverse decree, the question being governed by the exception stated in Chancery Rule 27, which requires such petition to be filed within a year, except for newly discovered evidence or on sufficient cause shown. *Tisman* v. *Tisman*, 94.

2. The granting or denial of a petition for leave to file a bill of review is discretionary and may be reviewed only for abuse of discretion. *Id.*

3. Where complainant, a widow, married defendant on acquaintance of about one day, and immediately following the ceremony returned to Chicago, where she had been living, to dispose of her effects, remaining for several months, and becoming estranged from her husband, who later filed a bill for divorce, and made a complete settlement and satisfaction of the claims of complainant to his property to induce her to withdraw her defense, and where a divorce was denied in that cause but subsequently granted to the husband on a cross-bill that he filed in her suit for separate maintenance, it was not an abuse of discretion to deny complainant's petition for leave to file a bill of review based on the discovery of evidence of adultery committed by the husband, the testimony showing that he had remarried since the entry of the decree, and that no equitable considerations required the interposition of the court. *Id.*

4. Notwithstanding the filing of an answer in the nature of a cross-bill, in a suit for divorce, the complainant is entitled to dismiss the proceedings without prejudice at any time before interlocutory or final decree, unless some legal interest of defendant or the State precludes. *Eisenbach* v. *Eisenbach*, 354.

5. Neither an order restraining defendant husband from incumbering or selling his property pending suit for divorce, nor an order for the payment of temporary alimony, so affects the merits of the controversy as to deprive complainant of her right to dismiss. *Id.*

6. Complainant was entitled to dismiss her bill for divorce after the hearing and before a final decree had been entered, her counsel having asked for and obtained further time to secure additional testimony, and the time having expired without complainant taking any steps to introduce the additional proof. *Id.*

7. *Held*, that the charge of extreme cruelty was established by the evidence. *Brayton* v. *Brayton*, 455.

See APPEAL AND ERROR (4, 5).

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DOCKET—See JUSTICES OF THE PEACE (3, 4).

DRAINS.

Within the meaning of the charter of the city of Flint, as amended, a storm drain, including a district of some 200 acres, in which from a fifth to a sixth of the population of the city lived, and which was constructed deep enough to connect with lateral sewers and branches in the district, intended by the municipal authorities to form part of a system and provide an outlet for surface water which tended to accumulate in the area drained, was a "trunk line intercepting sewer," defined in the charter as a sewer of which the principal object should be the general benefit of the health of the city, or which should be constructed to relieve the river of sewage, etc. *Berston* v. *City of Flint*, 266.

See MUNICIPAL CORPORATIONS (2); TAXATION (2).

DWELLING HOUSE—See WORDS AND PHRASES.

EJECTMENT—See PRESCRIPTION (1).

ELECTION OF COUNTS—See CRIMINAL LAW (21, 22).

ELECTION OF REMEDIES—See CHATTEL MORTGAGES (1).

ELECTION TO APPLY PAYMENT—See PAYMENT (1).

ELECTIONS.

In quo warranto proceedings, evidence that the board of election inspectors announced the result of the count to be favorable to relator but did not prepare a statement of the result, and, on the following day, at the request of respondent, who did not file a petition and pay a fee as required by law, caused the box to be opened and the ballots recounted, relator being absent, that as a result of the new proceedings respondent was declared elected to the office, *held*, insufficient to support respondent's title to the office of township treasurer because of the neglect to observe statutory requirements for recounting the ballots; and although relator was notified and appeared at the second recount, which was commenced later in the day, his presence without protest was not conclusive against him. 1 Comp. Laws, §§ 3638-3647 (1 How. Stat. [2d Ed.] §§ 238-248). *Wheeler* v. *Coleman*, 285.

ENFORCEMENT OF COVENANTS—See COVENANTS (2).

EQUAL PROTECTION OF LAWS—See CONSTITUTIONAL LAW (2).

EQUITABLE ESTOPPEL—See ESTOPPEL (1).

EQUITABLE REMEDIES—See CHATTEL MORTGAGES (1); USURY (5, 6).

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EQUITY.

1. Where the fact that the amount in controversy does not appear, from averments of the bill, to exceed $100, the proper practice is not to demur, since the defect is not fatal, but to raise the jurisdictional question by plea or answer, although it may be raised at the hearing, if it should appear from pleadings and proofs that the value or amount does not equal the required minimum. *George* v. *Rollins*, 144.

2. Complainant's bill, alleging that he sold a fur business to defendants, to be conducted by a corporation to be formed thereafter, under the name of "The House of George," which was a valuable trade name, that it was stipulated in the contract of sale that complainant should be entitled, on 60 days' notice, to require defendants to cease using the said name, that he had served notice but defendants refused to comply with the contract, and, for the purpose of evading the conditions of the agreement, had conspired together to form a corporation to use the name aforesaid, sufficiently averred facts entitling complainant to relief in equity, and was not demurrable for failure to show that the value in controversy was $100 or upwards, or for the reason that there was an adequate remedy at law. *Id.*

3. Decedent devised a life estate in his property and estate to his wife, and, after her death, a life interest in specified parcels to his two sons, charging the entire estate with the payment of certain legacies. The sons attempted to convey the fee of separate pracels to one another, and to execute a mortgage upon one of the farms belonging to the estate, following the decease of the widow and termination of her life interest. Out of the proceeds thus obtained, the legacies were paid and an existing incumbrance on the farm satisfied, and one of the life tenants executed to a purchaser, who innocently and mistakenly supposed that he was obtaining a clear title, a deed of a sixty-acre parcel belonging to the estate. Other conveyances were made, and default occurred under the mortgage. Discovering the error and the actual state of the title, the mortgagee filed a bill as complainant to obtain subrogation to the rights of the previously existing and discharged mortgage, making the grantee above-named and another purchaser from one of the life tenants a party. *Held*, that the remedy of subrogation was a proper method of relief in favor of complainant and the purchaser of the sixty acres, that the defendant purchaser last named must be relegated to his action at law for breach of warranty, on the ground that the proceeds went to the grantors personally, and a decree is entered disposing of the entire controversy and remanding the estate to the lower court to be wound up and distributed. *Stroh* v. *O'Hearn*, 165.

4. Equity will not dismiss a bill to quiet title for want of jurisdiction, if the evidence does not disclose that the

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EQUITY—Continued.

value of the property in dispute is less than $100; the fact that the parties to the litigation entered into a tentative settlement or compromise of the questions in dispute fixing a less value than $100, subsequently failing to act upon the agreement, will not control the matter of jurisdiction even if the evidence of compromise is competent. *School Dist. No. 2 of Sylvan Township, Washtenaw County*, v. *Musbach*, 243.

5. Although equity will not usually assume jurisdiction of a case in which the court of law affords full and adequate relief, a bill lies for an accounting for money entrusted to defendant to purchase materials for complainant, to be expended in numerous contracts of purchase where defendant had neglected and refused to render an account, and the transactions were complicated, the credits and accounts were mutual and the facts solely within defendant's knowledge. *Excelsior Wrapper Co.* v. *Yund*, 372.

6. Where complainants filed a bill to enjoin certain defendants from prosecuting their appeals from the allowance of claims filed against the estate of a decedent, and the point was first raised on appeal to the Supreme Court that the complainants' remedy was at law, and where the controversy had been heard and determined by the judge of the circuit court in chancery and if the complainants were remitted to the law side of the court several suits were likely to arise, jurisdiction is retained by the court to dispose of the alleged equitable estoppel relied on by complainants. *Roth* v. *Rubert*, 484.

See ACCOUNTING; CANCELLATION OF INSTRUMENTS (2); COVENANTS; FRAUD (1); INJUNCTION (1, 2); INTERPLEADER (1); INTOXICATING LIQUORS (12); PARTNERSHIP (3, 4); PAYMENT (1); RECEIVERS; REFORMATION OF INSTRUMENTS (1); SPECIFIC PERFORMANCE; SUBROGATION; USURY (5, 7).

ESTATES BY ENTIRETY—See MORTGAGES (1).

ESTATES OF DECEDENTS.

On appeal from the commissioners on claims in an estate, the cause is heard *de novo*, and the executrix who did not appeal may review the judgment of the circuit court on error. *In re Dubois' Estate*, 407.

See COMPROMISE AND SETTLEMENT (1); CONTRACTS (6); EQUITY (3, 6); ESTOPPEL (2); EVIDENCE (15); INTOXICATING LIQUORS (9, 10); RECEIVERS; SPECIFIC PERFORMANCE (1); WILLS (1, 4); WITNESSES.

ESTIMATE—See CRIMINAL LAW (23).

ESTOPPEL.

1. If a person by words or conduct intimates that he consents to an act and will offer no opposition to it, although it could not have been lawfully done without his con-

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ESTOPPEL—Continued.

sent, thereby leading others to change their position or relinquish rights which they might have enforced, he will not afterwards be permitted to question the legality of the act which he has sanctioned. *Roth* v. *Rubert*, 484.

2. Evidence considered, and *held*, to estop defendant from denying that her assignor assented to a compromise of his interest in decedent's estate and of claims presented against it. *Id.*

See CORPORATIONS (1); EQUITY (6); INSURANCE (4).

EVIDENCE.

1. Admissions claimed to have been made by the executors and proponents of a will, who, with others, were legatees under it, are inadmissible to prove undue influence. *In re Shanahan's Estate*, 137.

2. Evidence, *held*, to be insufficient to require submission to the jury of alleged undue influence. *Id.* 138.

3. On rejecting the direct examination of certain expert witnesses as to the sanity of deceased testatrix, the court should have excluded their cross-examination, for which no foundation remained in the case. *Paul* v. *Clements*, 251.

4. It is within the discretion of the trial judge to limit the redirect examination of an expert to matters developed on direct examination: the sustaining of contestant's objection to an explanation on the part of a medical witness, upon redirect examination, how he reached his conclusion as to the insanity of testatrix was not reversible error, in proceedings for the probate of a will. *Id.*

5. Excepting witnesses to a will, persons are not allowed to offer mere opinions as to the insanity or mental incompetency of a testator, but conclusions derived from actual observation and conversation with a decedent are admissible in connection with facts testified to by the witnesses which have a tendency to support their conclusions. *Id.*

6. And if all the facts stated by a witness considered as a whole tend to show unsoundness of mind, the opinion of the witness may be admitted. *Id.*

7. Books of account of an insolvent brokerage firm, showing the balances due to certain customers or creditors, were admissible in evidence, on an accounting, in which a correspondent firm is held to have been a joint tort-feasor with the insolvent in dealing with or converting securities entrusted by customers to the insolvent brokers. *Austin* v. *Hayden*, 331.

8. In assumpsit for a balance of salary due, it was proper cross-examination to inquire of the president of defendant corporation concerning the correctness of defendant's books, from which the witness had taken a statement

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EVIDENCE—Continued.

used by him on the stand: plaintiff was entitled to a full cross-examination as to material matters. No error was committed in refusing to strike from the evidence the statement so used by the witness and his testimony relative to the balance shown by the books of defendant. *Keel* v. *Wilson Fruit Juice Co.*, 345.

9. No prejudicial error was committed by introducing in evidence plaintiff's book showing amounts received by him, admitted by defendant's books to be correct, with the exception that a larger amount was credited by plaintiff to defendant than its own books disclosed; any possible error in the reception of this evidence favored rather than prejudiced defendant. *Id.*

10. *Held*, that the evidence was sufficient to sustain the verdict in plaintiff's favor. *Id.*

11. Where the issue between the parties related to the amount to be paid for a quantity of gravel, and plaintiff's agent had testified at considerable length with reference to a conversation with defendant, in which the latter wanted plaintiff to furnish the gravel at 45 cents a yard, and plaintiff's agent refused to do so, the witness afterwards stating that he remembered defendant agreed to pay 50 cents a yard, there was no error in refusing to strike out the testimony of the witness as a conclusion. *Detroit River Transit Co.* v. *Aldrich*, 357.

12. Evidence of dealings with other parties by plaintiff, and the price paid by them at different times and under different conditions from those existing at the execution of the contract, was not erroneously excluded. *Id.*

13. Testimony of a distributing agent that he had received from respondents a letter, offered in evidence, that it contained a blank affidavit, also introduced, which mentioned the names of respondents, to be filled out to prove the distribution of certain pamphlets or advertising matter in behalf of respondents, that the witness had received the letter from them in reply to one written by him, with testimony identifying the advertising matter and showing its distribution, *held*, to warrant the admission of letter and blank affidavit in evidence. *People* v. *Kennedy*, 384.

14. Respondents accused of publishing advertising matter in contravention of Act No. 62, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5299), were not prejudicially affected by testimony of a physician explaining the phrase "venereal diseases," and that the terms "lost manhood" and "lost vigor" had no medical significance. *Id.* 385.

15. Testimony of a claimant as to the contents of a letter sent by him to decedent, and referred to in a reply that decedent sent to claimant, was properly excluded as equally within the knowledge of decedent. Act No. 30, Pub. Acts

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EVIDENCE—Continued.

1903 (5 How. Stat. [2d Ed.] § 12856). *In re Dubois' Estate*, 407.

16. The jury need not be clearly convinced that plaintiff started a fire which caused a loss on his insured property; he is not entitled to recover if defendant establishes its defense to an action on the policy by a preponderance of the evidence. *Silverstone* v. *London Assurance Corporation*, 525.

17. It is incumbent upon the creditor to whom payments have been made to show by a preponderance of the evidence what application was made of the amounts received. *Van Sceiver* v. *King*, 605.

See ADJOINING LANDOWNERS (8, 9); CANCELLATION OF INSTRUMENTS (1); COMPROMISE AND SETTLEMENT (1); CONTRACTS (6); CRIMINAL LAW (5-7, 9, 10, 12, 14, 16, 23); DEEDS (3); DIVORCE (7); EQUITY (4); ESTOPPEL (2); FRAUD (1, 3-5, 7); INSURANCE (2, 3); INTOXICATING LIQUORS (1-6); MALICIOUS PROSECUTION (3); MASTER AND SERVANT (5); MECHANICS' LIENS; PARTNERSHIP (1); PLEADING (1); RAILROADS (5); SALES (2, 3); SPECIFIC PERFORMANCE (1); STREET RAILWAYS (2); TRUSTS; WILLS (2); WITNESSES (1).

EXCAVATION—See ADJOINING LANDOWNERS (1, 2, 4, 6).

EXCEPTION TO STATUTE—See CRIMINAL LAW (2).

EXCEPTIONS—See APPEAL AND ERROR (3, 6, 7).

EXCESSIVE VERDICT—See DAMAGES (5, 8).

EXCHANGE OF PROPERTY—See FRAUD (1, 2); SPECIFIC PERFORMANCE (2).

EXCLUSIVE POSSESSION—See PRESCRIPTION (2).

EXECUTION LEVY—See INJUNCTION (3).

EXECUTORS AND ADMINISTRATORS—See ESTATES OF DECEDENTS; INTOXICATING LIQUORS (9); WILLS (6).

EXEMPLARY DAMAGES—See INTOXICATING LIQUORS (7).

EXEMPTIONS—See TAXATION (1).

EXHAUSTING REMEDY—See INSURANCE (3).

EXPENSES—See MANDAMUS (2).

EXPERIMENTS—See CRIMINAL LAW (9, 10).

EXPERT TESTIMONY—See ADJOINING LANDOWNERS (9); EVIDENCE (3, 4).

EXPLOSIVES—See MASTER AND SERVANT (13).

EXTREME CRUELTY—See APPEAL AND ERROR (5); DIVORCE (7).

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FILING CLAIM—See MUNICIPAL CORPORATIONS (8).

FIRE INSURANCE—See EVIDENCE (16); INSURANCE (1, 2); VENUE (2).

FLINT CHARTER—See DRAINS; MUNICIPAL CORPORATIONS (2).

FORCIBLE ENTRY—See QUIETING TITLE (2).

FORECLOSURE—See SUBROGATION (4); USURY (5, 7); WITNESSES.

FORGERY.

In the offenses of forgery or uttering forged instruments, a fraudulent intent is the gist of the crime. *Prine* v. *Singer Sewing Machine Co.*, 300.

See MALICIOUS PROSECUTION (1).

FRAUD.

1. Upon a review of conflicting testimony, it is *held*, that complainants' bill to cancel an exchange of real and personal property should be dismissed for failure of complainants to establish that they relied on the alleged false representations as to value; *held*, also, that defendants did not falsely represent that certain pianos were free from incumbrances or conceal the amount due thereon. *McKenzie* v. *Cole*, 198.

2. No relief can be awarded to defendants, as prayed in their cross-bill, filed in a suit to cancel or annul an exchange of property, where complainants charged fraud and defendants claimed damages for breach of warranty. *Id.*

3. Evidence that defendant admitted charges of false representation in the presence of plaintiff and his attorney, who was sworn as a witness, was competent and admissible; testimony concerning other admissions made in plaintiff's absence, not being privileged, were properly admitted, in an action on the case for fraud, whereby defendant induced plaintiff to withhold from record a chattel mortgage on property that defendant conveyed away. *Priebisch* v. *Ottenwess*, 476.

4. Admissions made to plaintiff and his attorney during an attempt to collect the money which defendant owed, were not governed by the rule that negotiations for settlement are privileged; no dispute as to the indebtedness existing at the time of the conversations. *Id.*

5. Nor was it error to admit in evidence a dishonored check for the full amount of the alleged debt drawn by defendant on a drawee who had no funds of defendant in his hands. *Id.* 477.

6. In cases involving a charge of fraud, wide latitude should be allowed on cross-examination of the party charged with the unlawful conduct. *Silverstone* v. *London Assurance Corporation*, 526.

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FRAUD—Continued.

7. An assessment is not fraudulent merely because the valuation is excessive, unless an improper motive is shown: but if it is purposely made too high through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all competent persons, that tax is invalid. *Island Mill Lumber Co.* v. *City of Alpena*, 575.

See AMENDMENTS (1); COMPROMISE AND SETTLEMENT (1); CONTRACTS (3); FORGERY; INSURANCE (3); LOGS AND LOGGING; SALES (1); TAXATION (4, 5).

FRAUDS, STATUTE OF—See MASTER AND SERVANT (8).

FUTURE DAMAGES—See INTOXICATING LIQUORS (6).

GARNISHMENT.

Having appeared in garnishment proceedings and made disclosure without raising any objection to the jurisdiction of the court, after a trial in which the garnishee participated and after the entry of judgment and the lapse of a year and a half subsequent to trial, the garnishee defendant must be *held* to have waived any objections to the sufficiency of process and of service. *Heritage* v. *Armstrong*, 101 Mich. 85 (59 N. W. 439), overruled in part. *Chamberlain* v. *Wallace*, 609.

GENERAL PRAYER—See PARTNERSHIP (4).

GIFTS.

Mere inequality or unfairness between a grantor's children or heirs will not invalidate deeds of his property executed in contemplation of death, if he acted understandingly. *Reagan* v. *Murray*, 231.

See DEEDS (4).

GOOD FAITH—See CRIMINAL LAW (25).

GOVERNOR—See CONSTITUTIONAL LAW (3, 4).

HAZARDOUS EMPLOYMENT—See MASTER AND SERVANT (11).

HIGHWAYS AND STREETS—See CARRIERS (4); MUNICIPAL CORPORATIONS (3).

HOISTING DEVICE—See MASTER AND SERVANT (6).

HOMICIDE.

1. Where the prosecution claimed that the respondent and the wife of decedent conspired together to murder deceased for his insurance, and the evidence had no tendency to support the theory or that respondent, who claimed that the killing was accidental, knew of the life insurance, the subject should have been withdrawn from the jury, failure to do so constituting prejudicial error. *People* v. *Auerbach*, 23.

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HOMICIDE—Continued.

2. Evidence that respondent and decedent were out hunting, when the latter was killed by a shot from behind, that respondent made some effort to keep matters secret, claiming that he set his gun against a stump and it fell off, was discharged and killed his companion, that the sheriff and others experimented with the same gun in the manner described by the prisoner and the experiments tended to contradict the claim of respondent, and that the parties had previously been very friendly, the wife of decedent and the prisoner especially so, and respondent had conducted himself peculiarly and had displayed a purpose to keep the matter secret after the shooting, warranted the examining magistrate in holding the accused for trial. *Id.* 24.

See CRIMINAL LAW (7, 8, 13).

HOUSE OF ILL FAME—See CRIMINAL LAW (16).

HUSBAND AND WIFE—See CONTINUANCE; INTOXICATING LIQUORS (4, 5); MORTGAGES (1, 2).

IMMORAL ADVERTISEMENT—See CRIMINAL LAW (17).

IMPROVEMENTS—See CANCELLATION OF INSTRUMENTS (2); LIFE ESTATES (2).

INCOMPETENCY—See PLEADING (1).

INCUMBRANCES—See LIFE ESTATES (1).

INDEBTEDNESS OF HUSBAND—See INTOXICATING LIQUORS (5).

INDEPENDENT CONTRACTOR—See ADJOINING LANDOWNERS (7); MASTER AND SERVANT (1).

INDICTMENT AND INFORMATION—See CRIMINAL LAW (17, 18).

INDIGENT PARENTS—See DAMAGES (7).

INDUSTRIAL ACCIDENT BOARD—See MANDAMUS (2).

INFANTS—See MASTER AND SERVANT (11).

INFORMANTS—See CONTRACTS (8).

INJUNCTION.

1. In equity, it is a general rule that an injunction will not issue on a bill verified upon information and belief, unless it is supported by affidavits of persons who have knowledge of the facts: the pleading may be sworn to by complainant if he knows a part of the material facts and states the remainder on information and belief; and it is proper to support the same by affidavits of those who know the matters not positively averred. *Hartingh* v. *Bay Circuit Judge*, 289.

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INJUNCTION—Continued.

2. The equity of the bill was not fully met so as to require the dissolution of an injunction restraining a village council from granting licenses to more retail liquor dealers than the statute authorized, where complainant charged that defendant board of trustees of the village threatened to grant more retail liquor licenses than the law warranted, and set up facts showing the applications made and the purpose of a majority of the trustees to issue the licenses, and where defendant's answer merely negatived any threat to grant the applications as alleged but did not deny the other material averments. *Id.*

3. An execution levy, after judgment, on the interest which the debtor appeared from the record to own in certain realty, being regular and valid, it was erroneous to restrain further proceedings by an injunction as to the judgment creditor, who made the levy in good faith without any notice of any defect in the title, or fraud claimed to have been practiced by the debtor in obtaining the deed. *White* v. *Herrick Piano Co.*, 616.

See CONTRACTS (3); COVENANTS (2, 3); INTOXICATING LIQUORS (12); USURY (5, 7).

INSANE PERSONS—See COMPETENCY; DEEDS (1, 2); EVIDENCE (3-6); WILLS (2).

INSOLVENCY.

1. In determining priorities among claimants in the assets of an insolvent firm of brokers, defendant brokerage firm, which was held to have notice of the equities of claimants after a date fixed by the decree of the court, was correctly required to account to customers of the insolvent who had cash balances to their credit on the day stated: their accounts were not blended so as to deprive them of this right by purchasing or dealing in securities subsequent to that date. *Austin* v. *Hayden*, 331.

2. Also, claimants, who on the date in question owned securities on margins in possession of the insolvent and were entitled to a considerable credit balance at that time, although they thereafter continued trading, were rightly allowed to trace their stock into the hands of the defendant correspondent as preferred claims. *Id.*

See EVIDENCE (7).

INSPECTION—See MASTER AND SERVANT (4, 5, 7).

INSTRUCTIONS—See APPEAL AND ERROR (2); CONTRACTS (2); CRIMINAL LAW (3, 12, 13, 19, 20, 24); HOMICIDE (1); INSURANCE (1); INTOXICATING LIQUORS (7); MALICIOUS PROSECUTION (3); MASTER AND SERVANT (2, 7, 9); RAILROADS (6); SALES (1); TRIAL (3, 4).

INSURANCE.

1. In an action for a loss under insurance policies covering

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INSURANCE—Continued.

plaintiff's stock of merchandise, which defendant claimed and produced evidence tending to show plaintiff had set on fire, it was erroneous to charge that "unless the defendant has produced proof that clearly convinces you that plaintiff purposely caused the fire," the defense was not established. *Silverstone* v. *London Assurance Corporation*, 525.

2. Where there was evidence of suspicious circumstances surrounding the fire, and plaintiff was the last person in the store before the fire broke out, and there was testimony of plaintiff's financial embarrassment, and excessive claim of loss, it was a question of fact for the jury to determine whether he caused the loss. *Id.*

3. Where the beneficiary, in a mutual benefit policy, filed her petition for a hearing on her claim, which was granted by the society issuing the policy, and at the hearing her attorney submitted no proofs relative to the age of decedent, which the insurer had questioned, but submitted merely an offer of compromise which the insuring body rejected, and it appeared that the attorney for the beneficiary had made no attempt to push the settlement of the controversy after receiving notice that the claim would be considered, and that he filed no complaint relative to its failure to act, but suffered the matter to stand nearly two years after the filing of the petition, when he wrote requesting defendant order to fix a date for hearing, presenting no proofs, as requested by the order at that time, and taking no appeal from the final rejection of the claim, no sufficient excuse on the ground of fraudulent or oppressive action was made out and the defense, available under plaintiff's policy that the remedies within the order had not been exhausted, was conclusive against the claim. *O'Neill* v. *Ancient Order of Gleaners*, 628.

4. And where the administrator of such beneficiary took no steps after her death to obtain a hearing before the supreme council of the order, he was not entitled to resort to the courts. *Id.* 629.

INSURANCE COMPANIES—See TAXATION (1).

INSURER OF BAGGAGE—See CARRIERS (2).

INTENT—See FORGERY (1); MALICIOUS PROSECUTION (1); USURY (2, 4).

INTEREST.

Interest is recoverable on a sale of goods not shown to have been bought on credit. *Knapp* v. *Hubbard*, 264.

See LIFE ESTATES (1).

INTERLOCUTORY ORDERS AND DECREES—See DIVORCE (5).

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INTERPLEADER.

1. The remedy of interpleader is available only if defendants claim the same debt or thing, and if all adverse claims depend on or were derived from a common source, and if the complainant has no interest in or claim upon the subject-matter, and complainant must have incurred no independent liability to any of the claimants. *Lanning* v. *Stiles*, 275.

2. Brokers claiming commissions under separate contracts, executed on different dates, covering the same property but different amounts of land, and possibly providing for different commissions, cannot be compelled to interplead although complainant admits that she owes either one or the other defendant compensation: the contracts were distinct and the claims depend on different sources; complainant also may have incurred an independent liability to both brokers. *Id.*

INTERPRETATION OF RESTRICTIVE CLAUSE—See DEEDS (5).

INTOXICATING LIQUORS.

1. Evidence of pain and suffering experienced by plaintiff's husband was inadmissible for the purpose of showing his condition and inability to work, in an action brought by the wife against certain liquor dealers for unlawful sales resulting in injury and disability to such husband. *Spencer* v. *Johnson*, 278.

2. And it was erroneous to admit evidence that he had sold his cow, horse, and farm to support his family during his disability. *Id.*

3. Testimony that he had borrowed money for their support was competent, but its effect should be limited to the question of the length of time during which lack of support might be expected to continue. *Id.*

4. It was proper, also, to admit evidence of the value of the wife's services in nursing him during his illness. *Id.*

5. Indebtedness of plaintiff's husband for borrowed money and medical attention should be taken into consideration only for the purpose of determining the length of the period during which plaintiff would probably be deprived of her customary support. *Id.* 279.

6. Although the mortality tables were not introduced in evidence, there was no error in leaving to the jury the question of plaintiff's future damages, the husband's injuries not being permanent; the testimony as to his age, physical condition, habits, etc., and plaintiff's age and appearance, constituted a sufficient basis for the finding. *Id.*

7. Nor did the court err in reading to the jury the statute on which plaintiff's action was based, where he did not

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INTOXICATING LIQUORS—Continued.

leave the question of exemplary damages to the jury in his charge. *Id.*

8. Under the provisions of the Warner-Cramton act (Act No. 291, Pub. Acts 1909, 2 How. Stat. [2d Ed.] § 5055 *et seq.)*, the death of a saloon keeper terminates his license, and it is treated as a surrender, reducing the number of saloons that may be lawfully licensed in a community that had more than one saloon to 500 inhabitants at the time the law went into effect. *Hartingh* v. *Bay Circuit Judge*, 289.

9. The right to carry on the business of selling intoxicating liquors at retail is in the nature of a personal license, and does not pass to the personal representatives of a deceased licensee. *Id.*

10. The amendment of 1911, Act No. 170 (2 How. Stat. [2d Ed.] §§ 5056, 5062 *et seq.)*, does not apply to licensees who died before the act took effect: it recognizes, however, that a license is surrendered on the death of a licensee and adds a period of grace on the filing of a new bond by the administrator. At the end of the year for which the license was granted all rights thereunder end and no authority to apply for a renewal vests in the personal representative. *Id.*

11. The decease of a licensed saloon keeper works a voluntary surrender within the meaning of the statute. *Id.* 290.

12. The attorney general is a proper party complainant in equity to prevent the violation of law by village trustees by the unlawful issuance of licenses to retail liquor dealers. *Id.*

13. Upon relator's petition for mandamus to compel the Detroit common council to grant his application for a retail liquor license, without any showing as to the number of licenses which might be lawfully granted, or which had been issued, being also silent as to any vacancy in the number granted, the prayer of the petition, that asked for a peremptory writ without giving respondents a hearing, was properly denied. *Wojnowski* v. *Com. Council of Detroit*, 349.

See CRIMINAL LAW (23-25); INJUNCTION (2).

INVESTMENTS—See USURY (3).

JOINT TORT-FEASORS—See EVIDENCE (7).

JUDICIAL ACTS—See CONSTITUTIONAL LAW (4).

JURISDICTION—See ACCOUNTING (2); APPEAL AND ERROR (4); EQUITY (1, 3-6); GARNISHMENT; JUSTICES OF THE PEACE (1-3); MUNICIPAL CORPORATIONS (7); PROHIBITION; SUBROGATION (1, 2).

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JUSTICES OF THE PEACE.

1. The return of a constable that he served a justice's summons "on the 6th day of May, 1903, on Citizens' Telephone Company, the defendant's agent, by delivering to S. E. H. a copy thereof at," etc., did not confer jurisdiction: it was not made to appear that S. E. H. who was served was defendant's agent; and a special appearance on the return day to move to quash the proceedings did not subject the defendant to the jurisdiction of the court. *Hoben* v. *Citizens' Telephone Co.*, 596.

2. Nor could the jurisdictional defect be aided by amendment. 3 Comp. Laws, §§ 10272, 10273 (5 How. Stat. [2d Ed.] § 12973). *Id.*

3. The jurisdiction of a justice of the peace must appear affirmatively on the face of the proceedings, and jurisdiction of the defendant must be obtained by proper service of legal process where the defendant does not appear and give such service. *Id.*

4. Upon a justice's docket showing that the plaintiff proceeded to trial on the adjourned day without waiting an hour for the defendant to appear, the judgment should be reversed on certiorari. *Id.*

5. That the testimony of certain witnesses, offered by plaintiff before the justice of the peace, was taken and set out in an affidavit of defendant's attorney for a writ of certiorari, had no tendency to contradict the record which showed a special appearance and no general appearance of the defendant. *Id.*

JUSTIFICATION—See MALICIOUS PROSECUTION (2).

KNOWLEDGE OF AFFIANT—See PROCESS (1).

LAND CONTRACTS—See MORTGAGES (1, 2).

LAST CLEAR CHANCE—See STREET RAILWAYS (4).

LATERAL SUPPORT—See ADJOINING LANDOWNERS (1, 3, 4); MASTER AND SERVANT (1).

LEGACIES—See WILLS (1).

LEVY OF EXECUTION—See INJUNCTION (3).

LICENSE—See INTOXICATING LIQUORS (8-11).

LICENSE, APPROVAL OF—See INTOXICATING LIQUORS (13).

LIENS—See SUBROGATION (3).

LIFE ESTATES.

1. It is the duty of the life tenant, whose estate is subject to a mortgage upon the fee, to discharge the interest; and the remaindermen are charged with the duty of paying the principal. If the life tenants pay the incumbrance or

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LIFE ESTATES—Continued.

mortgage, they may call on those having title to the remainder for contribution; if the reversioner satisfies the incumbrance when it becomes due, the life tenants may be required to contribute as their share the interest on the amount paid, based on the term of the life estate. *Stroh* v. *O'Hearn*, 164.

2. Improvements made by a life tenant, being presumed to be made for his own benefit, are not chargeable to the remaindermen. *Id.* 165.

See RECEIVERS (1); WASTE (1); WILLS (3, 5).

LIFE INSURANCE—See INSURANCE (3, 4).

LIGHTNING—See CARRIERS (3).

LIGHTS—See RAILROADS (3, 4, 6).

LIQUIDATED DAMAGES—See DAMAGES (3).

LOGS AND LOGGING.

Evidence that plaintiff contracted with defendant to cut and remove from plaintiff's land a quantity of inferior, culled, and fallen or "down" timber, and paid defendant for the number of feet scaled by him, which plaintiff claimed was excessive and fraudulent, that plaintiff saw most of the timber that defendant hauled out before making the final payment and defendant testified that he did not agree to cull the timber and scaled it correctly, according to his best judgment, was insufficient to present a question of fraud for the jury, and the trial court committed no error in refusing to apply the rule of "merchantable scale" to the transaction. *Watkins* v. *Burdick*, 433.

See WASTE (1).

MALICIOUS PROSECUTION.

1. Testimony that plaintiff, in an action for malicious prosecution, took orders for sewing machines as agent for defendant, to be paid for in cash, and executed leases which he signed or caused to be signed in the name of the purchasers, and forwarded to defendant, plaintiff claiming that he followed a custom of the agency in so doing, for the purpose of keeping a record of the sale, and gained no profit by the transaction, presented a question of fact whether or not defendant had probable cause to arrest plaintiff for forgery. *Prine* v. *Singer Sewing Machine Co.*, 300.

2. In order that the advice of the prosecuting attorney may constitute a defense to an action of malicious prosecution, it must be made to appear that full and fair statement of all the material facts was made to him by defendant: failure to state any material matters may raise an issue

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MALICIOUS PROSECUTION—Continued.

of fact, sufficiently justifying the court in leaving the issue to the jury. *Id.* 301.

3. Defendant was entitled to have given, as a part of the charge, a requested instruction that neither discontinuance of a prosecution nor discharge of the plaintiff on his examination established want of probable cause or plaintiff's innocence; and a charge that such discontinuance and discharge *prima facie* established want of probable cause was prejudicial to defendant's rights. *Id.*

See FORGERY.

MANDAMUS.

1. Mandamus, being a discretionary writ, will not issue to compel a circuit court to restore a case to the calendar, from which it was stricken, and proceed with the trial, after the term has passed. *Palmer-Stevenson Construction Co.* v. *Mason Circuit Judge*, 326.

2. The appropriation of $25,000 for an industrial accident board, by Act No. 10, Extra Session 1912, was intended as a limitation upon the entire expenses of the department, including rent, stationery, printing, and salaries, and the auditor general will not be compelled, by mandamus, to charge to the general fund of the State expenses of equipment, rent, etc.: it was the clear purpose of the legislature to limit the expenditures of the board for legal purposes to the sum appropriated. Const. art. 10, § 16. *Kinnane* v. *Auditor General*, 340.

See CONTINUANCE; COSTS; INTOXICATING LIQUORS (13); MUNICIPAL CORPORATIONS (5).

MARRIED WOMEN—See INTOXICATING LIQUORS (4).

MARSHALING ASSETS—See INSOLVENCY (1).

MASTER AND SERVANT.

1. Under a construction contract which provided that the architect and his assistants should have free access to the work, that the contractor should commence and cease from operations when directed by the architect in case the work was insufficiently or insecurely done, that the owner might at any time make alterations in the plans, and the architect might determine at all times how many men should be employed continuously, and that in case of the failure of the contractor to furnish materials and perform labor according to the contract the owner might take the work into his own charge, supervision and control of the work upon the foundation was so reserved in the proprietor as to charge him for injury caused to an adjoining building by negligent sinking of caissons and removal of sufficient lateral support. *Bissell* v. *Ford*, 65.

2. Every normal, mature man must employ his senses in self-protection whenever there may be reasonable cause

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MASTER AND SERVANT—Continued.

to apprehend danger, and must do all that an ordinarily prudent man ought to do under the circumstances, and while it is the master's duty to instruct a servant as to risks which may not be discovered in the exercise of ordinary caution, obvious risks or dangers are assumed by the servant. *Newberry* v. *Boyne City Tanning Co.*, 437.

3. Where plaintiff was familiar with woodworking machinery as a result of long experience, and knew that adjustments of the machine he was using were required to be different for hard than for soft wood, he could not recover for injuries sustained in attempting to plane a piece of hard wood, without examining the adjustments of the planer, which were not in condition for the work he was attempting to perform, causing the piece to fly back and force plaintiff's hand on the knives. *Id.*

4. It is the master's duty not only to furnish a safe cable for a hoisting apparatus in its mine, but also to provide reasonable inspection to see that it remains safe. *Maki* v. *Mohawk Mining Co.*, 498.

5. Evidence that a cable, having a supposed breaking strain of 7½ tons and a safe working strain of 2½ to 3 tons, parted under a load of about 486 pounds, that the broken end was badly frayed and weak, tended to support plaintiffs' claim of negligent failure to inspect. *Id.*

6. Where plaintiff had no instructions to ascend the shaft by walking up the footwall of the mine in which he was employed, and had been told by the servant to whom he looked for orders and instruction to aid his ascent by taking hold of the bucket, and neither had previously done the work in which they were engaged at the time of the accident, and defendant had provided no ladders, it could not be said that plaintiff assumed the risk or was guilty of contributory negligence for ascending with the aid of the bucket connected with defendant's hoisting device which broke and caused injuries to plaintiff. *Id.*

7. Where defendant, in an action for personal injuries, sustained in its mine by the falling of rock, claimed that the premises had been adequately inspected two weeks before the fall, but the testimony showed that blasting was done every day in the mine and it had a tendency to loosen the rock, the court properly refused to charge, as requested by defendant's attorneys, that if the place was inspected at the time and in the manner customary in mines of the kind defendant conducted, and such inspection failed to disclose the loose condition of the rock, plaintiff could not recover. *Moilanen* v. *Washington Iron Co.*, 505.

8. Where several incorporators entered into a written contract providing that plaintiff should have charge of and manage the foundry of a corporation which was not yet organized, and it was not determined what his salary or

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MASTER AND SERVANT—Continued.
term of employment should be, in an action for wrongful discharge plaintiff was entitled to introduce testimony to show a subsequent oral agreement of the corporation to pay him $1,500 a year, and that the term of employment should be a year: nor was the contract void under the statue of frauds, performance being possible within a year. *Galvin* v. *Detroit Steering Wheel & Windshield Co.*, 569.

9. On the trial of a personal injury case, brought by an employee of the city who was hurt by the caving in of a trench which he was working in, the court covered defendant's request to charge the jury that if defendant's agent or officer instructed plaintiff's fellow-servant to watch the bank and give necessary warning, his failure to do so was the proximate cause of the injury, where the charge as given stated that if plaintiff was negligent, because he assumed an improper or unsafe position, he could not recover, that if he was warned, as defendant claimed, of the danger, or heard the fellow-servant instructed to watch the place and that it was dangerous, he would be chargeable with the duty of using great care, but if he did not hear it, the jury should not consider the testimony on that point, that if defendant's agent placed a servant to watch the bank for any warning of a cave-in and to give immediate notice to the other workmen, defendant performed its legal duty, and that defendant was only required to furnish a reasonably safe place to work. *Keenan* v. *City of Mount Pleasant*, 621.

10. Upon testimony that plaintiff was assured by defendant's water commissioner, in charge of its work, that the trench was safe and that the plaintiff did not hear the instructions given a fellow-servant to warn the men of danger, the questions of assumption of risk and of contributory negligence became questions of fact for the jury. *Id.*

11. Evidence that plaintiff was 16 years old at the time he was injured, that he had been employed in work at the saw which caused the injuries on numerous occasions previously, that the saw was guarded but the guard had been left up so it did not protect plaintiff, that although it was not necessary to bring his hand nearer than three inches from the saw, in pushing a piece of soft lumber through it, he received an injury to his hand which, his testimony tended to show, resulted from the saw striking a knot and from plaintiff's failure to release the pressure in time to avoid having his hand forced against the saw, required the direction of a verdict for defendant on the ground that plaintiff was guilty of negligence contributing to his injuries. *Pequignot* v. *Germain*, 659.

12. In the construction of a scaffold for the erection of a building, it is the master's duty to provide suitable material: evidence that plaintiff was hurt by the breaking

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MASTER AND SERVANT—Continued.

of a weak board containing a knot, that other men had refused to work on the scaffold because they considered it unsafe, that there was not sufficient good lumber at hand when the scaffold was built to construct a safe one (although defendant produced testimony to the contrary), warranted the court in submitting to the jury the question whether suitable material had been supplied. *Bittner* v. *Howie Roofing Co.*, 674.

13. Evidence that plaintiff, a miner, in defendant's employ, having upwards of eight years' experience, exploded certain blasts which he had prepared and thereupon returned to the place where he had been working, when one of the charges which had not been discharged exploded and injured him, warranted the court in directing a verdict for defendant on the ground of contributory negligence. *Snarski* v. *Montreal Mining Co.*, 698.

See ADJOINING LANDOWNERS (7).

MATERIALS FURNISHED—See MASTER AND SERVANT (12).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEASED —See EVIDENCE (15); WITNESSES.

MAYOR—See CONSTITUTIONAL LAW (3).

MEASURE OF DAMAGES—See ADJOINING LANDOWNERS (10).

MECHANICS' LIENS.

In the absence of competent testimony to show the cost of remedying defects in the construction of a house, the opinion of the trial court, who found from the testimony and a view of the premises that the contractor had substantially complied with his contract and was entitled to recover nearly all the price provided for, will be affirmed, and defendant's suggestion and request that the cause be referred back for additional proofs, is overruled. *Fredrick* v. *Willis*, 106.

MERCHANTABLE SCALE—See LOGS AND LOGGING.

MINES AND MINING—See MASTER AND SERVANT (6, 7, 13).

MINISTERIAL ACTS—See CONSTITUTIONAL LAW (4).

MINORS—See MASTER AND SERVANT (11).

MISTAKE—See REFORMATION OF INSTRUMENTS; SUBROGATION (1).

MITIGATION OF DAMAGES—See DAMAGES (1).

MORTALITY TABLES—See INTOXICATING LIQUORS (6).

MORTGAGES.

1. In a suit for partition brought by one of the heirs of decedent, who had executed a deed of his farm to a third party, receiving back a contract for reconveyance to

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MORTGAGES—Continued.

decedent and his wife by the entirety, the purpose being to secure the grantee for money advanced, the rights of the parties are to be determined by the contract, and although the deed was in the nature of a mortgage or security for a debt, the rights of decedent passed at his death to the wife, and the children obtained no interest in the real property. *Robson* v. *Townley*, 581.

2. The wife did not waive her legal rights by accepting a quitclaim deed from the grantee or mortgagee, upon full performance of the contract. *Id.*

See LIFE ESTATES (1); SUBROGATION (1, 4); TAXATION (1); USURY.

MOTIONS—See VENUE.

MOTION TO QUASH—See PROCESS (1).

MOTIVE—See CRIMINAL LAW (13); FRAUD (7).

MULTIPLICITY OF SUITS—See EQUITY (6).

MUNICIPAL CORPORATIONS.

1. Defendant city purchased certain voting machines pursuant to Act No. 217, Pub. Acts 1905 (1 How. Stat. [2d Ed.] §§ 421-425), and issued a certificate of indebtedness, after using the voting machines at an election and finding that they were satisfactory. Interest was paid on the certificate to the assignee or indorsee and the voting machines were retained without objection by the city and used at two elections, and it appeared from the record that the vendor supplied a carton or box to place inside the booth, as required by subsequent statutory enactment. No official action was shown by the city as a basis of defense. *Held*, that the holder of the certificate of indebtedness was entitled to recover, notwithstanding the claim that the issuance of the certificate of indebtedness increased the municipal debt beyond the lawful maximum. *Cogswell* v. *City of Escanaba*, 156.

2. Under provisions of the city charter of Flint granting to the common council the power to determine what part of the expense of constructing trunk line sewers should be borne by the municipality, and limiting the amount to such part as primarily benefits the health of the entire city, a determination that the city should pay for 25 per cent. of the cost of a storm drain or sewer, in the absence of evidence of fraud or good faith, was conclusive. *Berston* v. *City of Flint*, 267.

3. A village is not liable for injuries caused plaintiff by driving across a filled trench, which had recently been opened to lay a water main, and which had been softened by a heavy rain, so that his vehicle sank down in crossing, being outside the 30-foot traveled roadbed and not at an intersection of a street, since reasonable safety for ordi-

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MUNICIPAL CORPORATIONS—Continued.

nary use is all that can be required of a municipal corporation in caring for the streets. *Patow* v. *Village of Oakwood*, 351.

4. Unless the common council of a village organized under the general law (1 Comp. Laws, § 2700, 3 How. Stat. [2d Ed.] § 5919), creates or establishes the office of village attorney by resolution or by ordinance, the village president has no authority to appoint an attorney: the sole power of employing an attorney is in the council. *Ganser* v. *Vanderveen*, 517.

5. Where the president of the village of East Grand Rapids announced to the council that he did not deem it necessary to hire a village attorney by the year, and the council thereupon adopted a motion to employ relator for the year 1912 at a salary, no village attorney having been provided for by ordinance or resolution, relator was entitled to the writ of mandamus to compel the president and clerk to sign an order on the treasurer for his compensation. *Id.*

6. Charter commissions elected pursuant to the provisions of Act No. 279, Pub. Acts 1909, as amended by Act No. 203, Pub. Acts 1911 (2 How. Stat. [2d Ed.] § 5442 *et seq.*), are not legislative bodies, but are independent of and distinct from the common council, which is the sole legislative agency of the municipality. *Eikhoff* v. *Charter Commission of Detroit*, 536.

7. The charter commission of the city of Detroit has no jurisdiction to expel a member of the commission duly appointed for the unexpired term of a member who has resigned. The writ of prohibition will issue to restrain an attempted exercise of power to expel. *Id.*

8. Under 1 Comp. Laws, § 3081 (2 How. Stat. [2d Ed.] § 5603), requiring the filing of a claim for injuries with the council of a city, the failure to present the same is a matter of defense, which defendant must show: plaintiff's omission to prove the fact did not entitle defendant city to a verdict. *Keenan* v. *City of Mount Pleasant*, 621.

See COSTS; DRAINS; INTOXICATING LIQUORS (13); MASTER AND SERVANT (9, 10).

MURDER—See CRIMINAL LAW (7); HOMICIDE.

NAME—See PROCESS (2).

NEGLIGENCE—See ADJOINING LANDOWNERS (2, 4-6); CARRIERS (4, 5); DAMAGES (1, 6, 8); MASTER AND SERVANT (2-6, 9, 10, 12); MUNICIPAL CORPORATIONS (3); RAILROADS (3, 4); STREET RAILWAYS.

NEGOTIABLE INSTRUMENTS—See FRAUD (5).

NEWLY DISCOVERED EVIDENCE—See DIVORCE (1).

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NEW TRIAL—See APPEAL AND ERROR (2); EVIDENCE (10).

NOMINAL SHAREHOLDER'S LIABILITY—See CORPORATIONS (1).

NOTICE.

The right to serve notice of trial or other papers, by mail, under Circuit Court Rule 28*e*, on an attorney living in the same town, is not dependent on any contingency such as the attempt to first obtain service by other customary methods, and a party may resort to service by mail in the first instance, although the effect may be to cut short the time specified by rule or statute. *Palmer-Stevenson Construction Co.* v. *Mason Circuit Judge*, 326.

See CORPORATIONS (3); INJUNCTION (3); INSOLVENCY (1); TAXATION (3).

NOVATION—See CONTRACTS (6).

OBSCENE EXHIBITIONS—See CRIMINAL LAW (1).

OBVIOUS DANGER—See MASTER AND SERVANT (2, 3).

OFFER AND ACCEPTANCE—See CONTRACTS (7).

OFFICER OF CORPORATION—See EVIDENCE (8).

OPENING OF BALLOT BOX—See ELECTIONS.

OPERATION OF CARS—See STREET RAILWAYS (3).

OPERATION OF TRAIN—See RAILROADS (3).

OPINION EVIDENCE—See EVIDENCE (5, 6); WILLS (2).

OPPRESSION—See INSURANCE (3).

OPTIONS—See BROKERS (1).

ORAL CONTRACT—See CANCELLATION OF INSTRUMENTS (1); MASTER AND SERVANT (8).

PAIN AND SUFFERING—See INTOXICATING LIQUORS (1).

PARENT AND CHILD—See DAMAGES (7); GIFTS.

PAROL EVIDENCE—See MASTER AND SERVANT (8).

PARTIES—See INTOXICATING LIQUORS (12); PARTNERSHIP (5, 6); PROCESS (2).

PARTNERSHIP.

1. Complainant's contention, in a suit for a partnership accounting, that his testator was an equal partner in farm property bought in defendant's name, on land contract, deceased paying nothing, and binding himself to no definite time of payment, obtaining no written evidence of the claimed half interest, *held*, not to be established by conflicting evidence. *Miller* v. *Casey*, 221.

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PARTNERSHIP—Continued.

2. Under a bill filed for an accounting, charging the existence of a partnership arrangement in the ownership and operation of a farm, which theory the evidence did not sufficiently sustain, an accounting could not be ordered as to stock buying and selling in which the proofs showed that the parties had engaged together, since the relief granted must conform to the general theory of the pleadings. *Id.*

3. It is not enough that the proofs show that complainant is entitled to some relief; for unless that is the relief warranted by the averments of his bill, complainant has failed to make out his case. *Id.*

4. The general prayer for relief goes no further than to enlarge the special prayer for relief, as the case may warrant. The remedy awarded must always be consistent with the case made by the bill, not different from it. *Id.* 222.

5. While a partner as assignee of the firm may bring an action in his own name as plaintiff for services rendered, he must allege and prove an assignment to himself in order to entitle him to recover after the dissolution of the firm. *McKnight* v. *Lowitz*, 452.

6. Services rendered by one member of a copartnership engaged in the practice of the law are presumed to constitute a partnership account, belonging to the firm: testimony of one partner that the account belonged to him, or of the other that he never had any interest in the account, and claimed none at the time, is insufficient to sustain an action in the name of the one partner, commenced after dissolution. *Id.*

PAYMENT.

The debtor may elect which of two or more debts shall be credited with a payment: the creditor has the right to elect if he does not; and if the amount received is not applied by either party, equity may make such application as may be fair between the parties. *Van Sceiver* v. *King*, 606.

See CONTRACTS (2); EVIDENCE (17); INTEREST (1); SALES (3).

PERMANENT INJURIES—See INTOXICATING LIQUORS (6).

PERSONAL INJURIES—See CARRIERS (4, 5); DAMAGES (8); MASTER AND SERVANT (2, 6, 9-13); MUNICIPAL CORPORATIONS (3, 8); STREET RAILWAYS (1, 4).

PERSONAL PROPERTY—See CHATTEL MORTGAGES.

PHYSICIANS AND SURGEONS—See CRIMINAL LAW (3); EVIDENCE (4, 14).

PLACE OF ALIGHTING—See CARRIERS (4).

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PLEA—See PLEADING (3); PROCESS (2).

PLEADING.

1. Proof that plaintiff, in a personal injury action, was mentally defective or incompetent, is inadmissible unless the declaration contains averments sufficient to apprise defendant, his employer, of the claimed condition, although the testimony is offered to negative contributory negligence, and not as a basis for damages. *Hill* v. *Abram Smith & Son*, 151.

2. Damages for breach of contract are not recoverable under the common counts. *Detroit River Transit Co.* v. *Aldrich*, 357.

3. In giving special notice of defense for breach of an alleged contract, defendant must set up the terms of the contract as in a declaration: it is insufficient to refer to plaintiff's declaration on the common counts by an averment that "plaintiff failed and neglected to perform the contract upon which this suit is brought," etc., since no special contract is alleged in the declaration. *Id.*

See AMENDMENTS (1); APPEAL AND ERROR (5, 8); CARRIERS (1); EQUITY (1); INJUNCTION (1, 2); PARTNERSHIP (2-4); USURY (6).

POOR LAW—See DAMAGES (7).

POPULATION—See CRIMINAL LAW (23, 25).

POSSESSION OF MORTGAGED PERSONALTY—See CHATTEL MORTGAGES.

POSSESSION OF REAL PROPERTY—See QUIETING TITLE.

PRACTICE—See APPEAL AND ERROR (3, 10); EQUITY (1); NOTICE.

PREFERRED CREDITORS—See INSOLVENCY (2).

PRELIMINARY EXAMINATION—See HOMICIDE (2).

PREPONDERANCE OF EVIDENCE—See EVIDENCE (16).

PRESCRIPTION.

1. Where a private way is improved by the owner and left open for the convenience of others, their use in common with the owners and those for whose special benefit it was opened is, as a rule, to be regarded as permissive only and under an implied license. As to a defendant who claims that his testatrix had exercised adverse user of a strip belonging to an alley that consisted of land taken from both adjoining owners, the use made of that portion taken from property which she did not own must be treated as permissive, not adverse. *Le Roy* v. *Collins*, 465.

2. Defendant could not obtain title to that part of a vacated alley which belonged to adjoining property owners, under

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PRESCRIPTION—Continued.

evidence of joint user by decedent with the other proprietors, permissive in its inception and not under color of title, since her alleged occupation under a claim of right which they disputed did not become exclusive, and the possession and user by both parties was of the same character. *Id.*

3. Neither occupation in common with the public nor possession concurrent with that of the true owner is ever exclusive. *Id.*

PRESUMPTIONS—See CRIMINAL LAW (8); RAILROADS (4); TAXATION (5); TRIAL (3).

PRIMARY SCHOOL FUNDS—See SCHOOLS AND SCHOOL DISTRICTS (1).

PRINCIPAL AND AGENT—See ACCOUNTING (2); ADJOINING LANDOWNERS (7); CORPORATIONS (2); RAILROADS (1, 2).

PRIVATE WAY—See PRESCRIPTION (1).

PROBABLE CAUSE—See MALICIOUS PROSECUTION.

PROCESS.

1. On motion to quash a writ of *capias ad respondendum*, issued on plaintiffs' affidavit that they were induced to take defendant's note for a balance due, in an exchange of property, by false representations of defendant, who stated that he owned several houses and lots, and that a surety on the note owned certain property; that affiants had *ascertained* that defendant did not own the houses as represented, and the surety did not possess the property stated, the writ should have been quashed, for the reason that affiants could not have personal knowledge as to the ownership of the property, and the affidavit was insufficient. *Rice* v. *Kalamazoo Circuit Judge*, 322.

2. The objection that a defendant was not sued under its correct corporate name must be raised by plea in abatement or is waived. 3 Comp. Laws, § 10473 (5 How. Stat. [2d Ed.] § 13518). *Hoben* v. *Citizens' Telephone Co.*, 596.

See GARNISHMENT; JUSTICES OF THE PEACE (2, 3); RAILROADS (1, 2).

PROHIBITION.

Prohibition is the proper remedy to restrain the attempt of the Detroit charter commission to oust a member of the body from his office, after a hearing and determination that were void for want of jurisdiction. *Eikhoff* v. *Charter Commission of Detroit*, 536.

See MUNICIPAL CORPORATIONS (7).

PROSECUTING ATTORNEY—See APPEAL AND ERROR (1); CRIMINAL LAW (8, 22); MALICIOUS PROSECUTION (2).

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PUBLIC HEALTH—See MUNICIPAL CORPORATIONS (2).

PUBLIC OFFICERS—See MUNICIPAL CORPORATIONS (4); PROHIBITION.

PUBLIC OFFICERS, REMOVAL OF—See CONSTITUTIONAL LAW (3).

PUBLIC POLICY—See WILLS (3, 4).

QUIETING TITLE.

1. A bill to quiet title cannot be maintained against a party in possession. Act No. 256, Pub. Acts 1909 (4 How. Stat. [2d Ed.] § 11965). *School Dist. No. 2 of Sylvan Township, Washtenaw County*, v. *Musbach*, 243.

2. No such fraudulent or forcible assumption of possession appeared as to deprive defendant of his right to make claim thereto in a case in which he had openly advised complainant of his claim to ownership, and threatened to fence in the land, and later without using any force enclosed the land with other property held by him, having the record title of the parcel in dispute. *Id.* 244.

See EQUITY (4).

QUO WARRANTO—See ELECTIONS.

RAILROADS.

1. Service of a declaration and rule to plead upon the station agent of a railroad corporation, after the appointment of receivers by the Federal court and notice to the agent to continue his employment for the receivers as theretofore, is a valid and sufficient commencement of suit against the railroad company. *Ennest* v. *Pere Marquette R. Co.*, 398.

2. The corporation continued to exist as a railroad company, although it was in the hands of receivers, and its station agent remained, for the purpose of serving process, the agent or employee of the corporation within the meaning of Act No. 260, Pub. Acts 1899 (5 How. Stat. [2d Ed.] §§ 13523, 13524). *Id.*

3. Evidence that defendant's extra train passed through a station on its line about midnight, running at from 30 to 40 miles an hour, striking and killing decedent, who was waiting for a passenger train, that the night was dark and misty and no headlight was displayed, although two lanterns were placed on the rear of the engine which was running backward, that there was no light at the station or in the yard, and that decedent was found in such a position as to permit of the inference that she was standing beside the track when the train struck her, with testimony in defendant's behalf tending to contradict plaintiff's claims as to speed and the failure to give statutory signals, warranted the trial court in submitting to

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RAILROADS—Continued.

the jury the question of defendant's negligent operation of the train. *Richardson* v. *Detroit & Mackinac R. Co.*, 413.

4. Considering her conduct in the light of the presumption that the deceased was in the exercise of reasonable care, testimony that the lights on the advancing train might easily have been mistaken for switch lights, that greasy spots were discovered on her clothing which might have been caused by catching in the machinery, and the condition of her clothing as well as the injuries found on the body were consistent with the theory that she was not on the track, the evidence presented a question of contributory negligence for the jury. *Id.*

5. Whether the extra train which passed through the station just before midnight caused the death of decedent, under evidence tending to show that it passed at 11:50 p. m. and that the watch of deceased stopped at that hour, was a question of fact, in connection with other testimony tending to show the body was cold when the regular train arrived. *Id.*

6. It was as favorable to defendant as the evidence warranted, for the trial judge to eliminate from the issues the claim that the station was not properly lighted, on the theory that deceased had waived such requirement; defendant had no reason to complain of instructions leaving the failure to provide lights as one of the conditions surrounding the accident to the jury, as bearing on the question of negligent operation of the train. *Id.* 414.

See DAMAGES (6).

RATIFICATION—See CORPORATIONS (2); DEEDS (2); ESTOPPEL (1).

REAL PROPERTY—See ADJOINING LANDOWNERS; DAMAGES (1); EQUITY (4); PARTNERSHIP (1); WILLS (1, 5).

REASONABLE TIME—See CARRIERS (1, 2).

RECEIVERS.

Upon a showing that an estate in process of probate has been mismanaged, incumbrances executed upon the interests of life tenants who mistakenly assumed to have a fee, that default has been made in the satisfaction of debts and legacies due from the estate, and in interest upon mortgages outstanding against the same, equity may enter a decree appointing a receiver. *Stroh* v. *O'Hearn*, 165.

See INSOLVENCY (1); RAILROADS (1, 2).

RECORDING ARTICLES—See CORPORATIONS (3).

RECORDING MORTGAGES—See CHATTEL MORTGAGES (2).

RECOUNT—See ELECTIONS.

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REDEMPTION—See TAXATION (3).

REDIRECT EXAMINATION—See EVIDENCE (4).

REFORMATION OF INSTRUMENTS.

A decree reforming a contract between complainant and defendant for the sale of defendant's grocery stock so as to include a provision against defendant engaging in the business for two years on a street mentioned, *held*, to be sustained by evidence of mutual mistake in drafting the instrument. *Isberg* v. *Miller*, 677.

REMAINDERMEN—See LIFE ESTATES.

REMAINDERS—See WILLS (5).

REMEDIES—See PARTNERSHIP (3).

REQUESTS TO CHARGE—See INSTRUCTIONS; TRIAL (4).

RESIDENCE PROPERTY—See COVENANTS (1, 3).

RESTRAINT OF TRADE—See REFORMATION OF INSTRUMENTS.

RESTRICTIVE COVENANTS—See COVENANTS (3); DEEDS (5).

RETURN—See JUSTICES OF THE PEACE (1, 5).

REWARDS—See CONTRACTS (7, 8).

RIGHT OF WAY OF SEWER—See TAXATION (2).

SAFE APPLIANCES—See MASTER AND SERVANT (4).

SALARY—See MASTER AND SERVANT (8).

SALES.

1. Where plaintiff purchased a horse which he knew was sick, for slightly more than half its value if it had been in good health, and defendants did nothing to deceive or defraud him, the court did not err to plaintiff's prejudice in refusing to charge, in an action to recover back the purchase price after its death, that, if the horse was incurably sick at the time of purchase, plaintiff could recover: it was not incorrect to limit his right of recovery to the issues of fraud and whether he acted on his own judgment. *Wineberg* v. *Porter*, 120.

2. On the trial of an action for wheat sold and delivered, evidence offered by defendant to show where the wheat was stored, how much was shipped out in a single consignment to a milling company, the weight and volume of the car as shipped and as received, the amount of wheat bought from others which was stored in the same bin and shipped in the same car, was admissible to prove that the quantity purchased of plaintiffs was less than they claimed. *Knapp* v. *Hubbard*, 264.

3. In an action for the conversion of an automatic piano,

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SALES—Continued.

which plaintiff purchased of defendant on the installment plan, claiming to have paid the entire purchase price, which defendant contended included interest and $50 more than plaintiff's testimony tended to show, it was a question for the jury whether plaintiff's contention was true as to the terms of the agreement which, it was undisputed, were modified at the time of delivery of the piano, and the court did not err in submitting it, though there was a writing which evidenced the original transaction. *Hautala* v. *Dover*, 366.

See AMENDMENTS (1); DAMAGES (3); INTEREST; REFORMATION OF INSTRUMENTS.

SALOONS—See CRIMINAL LAW (23-25); INTOXICATING LIQUORS.

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR (1, 3, 5-8).

SCAFFOLDS—See MASTER AND SERVANT (12).

SCHOOLS AND SCHOOL DISTRICTS.

1. In apportioning to the several school districts, semi-annually, the primary school money, pursuant to statutory requirements (1 Comp. Laws, §§ 4642-4644, Act No. 36, Pub. Acts 1905), in 1908, it was the duty of the superintendent of public instruction to determine the number of children in a district from the best evidence in his power to obtain, rejecting from the census reports, if defective, the names of children which should not appear therein, and he should base his action upon a report received from the secretary of a municipal school board made up from the best obtainable sources, showing the names of children who resided in the district at that time, and the names included in the census which ought to be rejected, even though the report was received late in the year, just before the May apportionment. *Public Schools of City of Muskegon* v. *Wright*, 6.

2. It was an improper exercise of the superintendent's discretion to reject from the list of names 91 school children whose parents or guardians, as shown in the report of the secretary of the public schools, resided in the district, and it was unlawful to reject the names of five children who were orphans attending school in the city and living with relatives that stood *in loco parentis*. *Id.*

SEPARATION OF DEPARTMENTS OF GOVERNMENT—See CONSTITUTIONAL LAW (3).

SERVICE OF PROCESS—See GARNISHMENT; JUSTICES OF THE PEACE (1, 3); RAILROADS (1).

SERVICE BY MAIL—See NOTICE.

SERVICES—See INTOXICATING LIQUORS (4).

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SET-OFF AND RECOUPMENT—See CONTRACTS (4, 5); PLEADING (3).

SEWERS—See DRAINS; TAXATION (2).

SPECIAL ASSESSMENTS—See TAXATION (2).

SPECIAL PROSECUTOR—See CRIMINAL LAW (8).

SPECIFIC PERFORMANCE.

1. Complainant and his family who resided in Texas came to Michigan in reliance on the promise of his stepmother to give him her farm at her death, in consideration of his caring for her and running the farm. During ten years and upwards complainant carried out the arrangement, evidenced by letters and other competent proof. Decedent made a will in pursuance of the conditions of the agreement, but it was not found at her death. By a prior will, which was probated, deceased left a life estate in the farm to complainant. There was evidence of a substantial performance of the contract. At the time of her death, decedent was 86 years of age. *Held*, that the contract should be specifically enforced. *Howe* v. *Benedict*, 522.

2. Specific enforcement, being a discretionary remedy, will not be granted to compel an exchange of real property, where complainant's property was shown to be of little, if any, value, above an incumbrance outstanding against it, although it had been represented to defendants as worth from $7,000 to $10,000 more than the debt secured; and where defendants' property was worth $10,000 or upwards. *State Security & Realty Co.* v. *Shaffer*, 639.

SPECIFIC TAX—See TAXATION (1).

STATEMENT OF FACTS—See APPEAL AND ERROR (10).

STATE TAX COMMISSION—See TAXATION (4, 5).

"STATION"—See RAILROADS (6).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTES.

It is a well-established rule of statutory construction that where powers are specifically conferred they cannot be extended by implication: it is to be inferred that no other or greater power was given than that which the statute specifies. *Eikhoff* v. *Charter Commission of Detroit*, 535.

See CONSTITUTIONAL LAW (1, 2); CRIMINAL LAW; EVIDENCE (14, 15); INTOXICATING LIQUORS (7, 10); MANDAMUS (2); MASTER AND SERVANT (11); MUNICIPAL CORPORATIONS (1, 4, 8); SCHOOLS AND SCHOOL DISTRICTS (1); TAXATION (1); USURY.

STOCK AND STOCKHOLDERS—See CORPORATIONS (1).

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STREET RAILWAYS.

1. It was not, as a matter of law, contributory negligence for plaintiff to cross a street car track on which no car was approaching, where plaintiff looked, at a point 17½ feet from the track, and observed a car on the intersecting street that she knew ordinarily did not turn on the street which she was attempting to cross, but proceeded, usually, in the direction it was taking along the intersecting track: and where plaintiff did not look again, being struck by the car as it turned onto the wye. *Richardson* v. *Detroit United Ry.*, 160.

2. Whether the driver of a vehicle was guilty of contributory negligence, in crossing a wye track of defendant street railway company in front of a car, relying on an alleged custom of the cars to stop at that crossing, was a question of fact. *Sailsky* v. *Detroit United Ry.*, 261.

3. The question of the negligence of defendant's motorman in colliding with the wagon on which decedent was riding, *held*, properly submitted to the jury under disputed evidence. *Id.*

4. The doctrine of subsequent or discovered negligence is applicable to an action for personal injuries sustained by plaintiff who stopped his automobile on defendant's street car tracks to permit a third person to get in, remaining about half a minute in that situation after looking for a car and seeing none approaching, the engine of the automobile running and the car coming up without giving a signal, striking the machine as plaintiff was trying to clear the track, the evidence showing that the motorman had a clear view of the track for 340 feet. *King* v. *Grand Rapids Railway Co.*, 645.

5. Plaintiff was in no sense a trespasser, and if the motorman, after discovering that plaintiff was on the track, failed to take reasonable precautions to avoid injuring him, the precedent negligence of plaintiff was no defense. *Id.* 646.

See CARRIERS (4, 5).

SUBROGATION.

1. Where complainant and one of the defendants asking affirmative relief, respectively advanced funds as a loan upon real property and to purchase land belonging to the estate of a decedent, mistakenly supposing that certain children of deceased had a complete title in fee to the realty sold and mortgaged, by conveyance of such children, and where the money realized was employed in paying off incumbrances against the estate property, and in paying certain legacies that the will provided for, complainant and such purchasing defendant were entitled in equity to be subrogated to the rights of the mortgagee who received payment out of the funds advanced by them. *Stroh* v. *O'Hearn*, 164.

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SUBROGATION—Continued.

2. The granting of subrogation is an equitable remedy, applicable when persons other than mere volunteers pay a debt or demand that in equity and good conscience should have been satisfied by another, and it is proper in all cases where injustice would follow its denial. *Id.*

3. In granting subrogation to complainants, they should be placed, as nearly as possible, in the condition existing at the time they acquired their interests, and should have a lien only to the amounts paid in satisfaction of the preceding incumbrances. *Id.* 165.

4. Proceedings taken by one of the complainants to foreclose his mortgage by advertisement, instituted subsequently to filing his bill for subrogation, which submitted to the court of chancery the entire matter of mortgage foreclosure and his right to a lien, were insufficient to affect the rights of the parties, and could not dispose of any matters in issue in the equity suit. *Id.*

See EQUITY (3).

SUBSEQUENT NEGLIGENCE—See STREET RAILWAYS (4).

SUFFICIENCY OF PROOF—See EVIDENCE (13).

SUPERINTENDENT OF PUBLIC INSTRUCTION—See SCHOOLS AND SCHOOL DISTRICTS.

SUPPORT—See INTOXICATING LIQUORS (2).

SUPREME COURT—See APPEAL AND ERROR (4).

SUPREME COURT RULES—See APPEAL AND ERROR (10).

SURPLUSAGE—See CRIMINAL LAW (18).

TAXATION.

1. In determining the amount of property liable to taxation, in the case of insurance corporations claiming deductions by reason of exempt bonds or property, and mortgages on which the company has paid a specific tax, the report of the State insurance commissioner, showing the balance subject to assessment, is not conclusive under Act No. 235, Pub. Acts 1903. If it is ascertained that such balance consists in whole or in part of tax exempt securities, the amount of the same should be deducted. The determination of the board of assessors, refusing to deduct mortgages of such corporation on which it has paid the specific tax under Act No. 91, Pub. Acts 1911, was rightly reversed, on mandamus, in the circuit court. *Northern Assurance Co. of Michigan* v. *Common Council of City of Detroit*, 80.

2. In preparing to construct a sewer and to levy a special assessment to pay for the same, the common council of the city of Flint acted without legal authority, where, instead of proceeding in the regular way to obtain a right

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TAXATION—Continued.

of way for the sewer, the city made a special arrangement with one of the manufacturing corporations within the district to allow a stated sum for the right of way through its lands and to limit the assessment of the corporation to $500, thereby paying more than the easement was worth and adding to the burden of the others assessed. *Berston* v. *City of Flint*, 267.

3. In order to cut off the right of redemption from a tax sale, the holder of the tax title must serve notice on all persons entitled thereto. The grantee under the last recorded deed in the regular chain of title is one of the parties entitled to notice and the provision is not met by service on a later grantee in certain tax deeds issued by the State. *G. F. Sanborn Co.* v. *Richter*, 562.

4. Evidence that the assessed valuation of plaintiff's real estate was increased by the State tax commission from $20,000 to $35,000, that the property was worth from $20,000 to $25,000, that other property was similarly treated at the same time, so that plaintiff's total taxes were reduced, that the State tax commission had at the same time raised the total assessed valuation of the city from $6,071,380, as fixed by the local authorities, to $9,417,245, is insufficient to show fraud or bad faith. *Island Mill Lumber Co.* v. *City of Alpena*, 575.

5. It will be presumed that the members of the tax commission exercised honesty and their best judgment in performing their official duty: the burden is on the plaintiff, in an action to recover back taxes paid under protest, to establish fraud, which cannot be inferred from a mere difference in judgment. *Id.*

See FRAUD (7); MUNICIPAL CORPORATIONS (2); USURY (1, 4, 7).

TESTAMENTARY DEEDS—See GIFTS.

TIME—See APPEAL AND ERROR (4); CRIMINAL LAW (14).

TOWNSHIPS—See CRIMINAL LAW (23, 25).

TRACING ASSETS—See INSOLVENCY (2).

TRADE NAMES—See CONTRACTS (3); EQUITY (2).

TRESPASSERS—See STREET RAILWAYS (5).

TRIAL.

1. While it may not constitute reversible error for the trial judge to absent himself from the bench during argument of counsel, the practice is not commendable. *Spencer* v. *Johnson*, 279.

2. It is the duty of the trial judge to be present and hear the argument of counsel to the jury, and although his absence may not amount to reversible error, he should

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TRIAL—Continued.

be present and afford an opportunity to counsel to make objections and obtain rulings during the course of the argument. *Prine* v. *Singer Sewing Machine Co.*, 301.

3. If conflicting instructions are given to the jury, it will be presumed that they may have followed that which was erroneous, and the verdict will be set aside, on error. *Silverstone* v. *London Assurance Corporation*, 526.

4. The trial court is not required to give requests to charge that single out a particular transaction or the testimony of a particular witness; if the matter is covered by a general charge which brings the entire evidence upon the given subject to the attention of the jury, the appellant may not complain. *Id.*

See APPEAL AND ERROR (6); CRIMINAL LAW (7, 8, 11-13, 15, 19, 24); EVIDENCE (3, 4); HOMICIDE (1); INSURANCE (1); MASTER AND SERVANT (7, 9).

TRIAL BY JURY—See CRIMINAL LAW (24).

TROVER AND CONVERSION—See DAMAGES (4, 5); SALES (3).

TRUNK LINE INTERCEPTING SEWER—See DRAINS.

TRUST COMPANY—See USURY (1, 3).

TRUSTS.

Where claimant held a note, given to pay indebtedness that had in part accrued before his debtor executed a deed of trust, and where claimant could not testify what part so accrued or what part of the note represented subsequent indebtedness, the court did not err in directing a verdict in favor of the trustee's estate. *In re Dubois' Estate*, 407.

See ACCOUNTING (1, 2); EQUITY (5); WILLS (6).

UNDUE INFLUENCE—See DEEDS (1); EVIDENCE (1, 2).

USELESS ORDERS—See MANDAMUS (1).

USURY.

1. Defendant and his wife executed to complainant trust company a mortgage bearing interest at six per cent. and providing in addition thereto that the mortgagors should pay all taxes and assessments levied upon the lands or upon or on account of the mortgage or indebtedness secured. Complainant claimed and introduced testimony tending to prove that it paid no taxes on its mortgages, at the time the conveyance was executed, for the reason that it paid taxes on capital stock which was invested in part in mortgages, that complainant never intended to collect and had never demanded more than the lawful rate of interest. It was conceded that the combined city and county taxes had exceeded 1.8 per cent. for a considerable period of years. Under the act authorizing the

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USURY—Continued.

incorporation of trust companies, it was provided that such company should deposit with the State treasurer not less than fifty per cent. of its capital stock in bonds and Michigan mortgages, that such corporation should have power to loan money on real estate and collateral security, that so much of the capital stock as must be placed on deposit might be invested in mortgages or other security upon property worth double the amount secured (2 Comp. Laws, § 6157 *et seq.*). 1 Comp. Laws, § 3824, provides that all property, real and personal, not expressly exempt from taxation, shall be subject to taxation, and section 3831 makes all shares of corporations, when the corporate property is not exempt, subject to taxation; section 3834 exempts from taxes the property of corporations that are required to pay specific taxes. *Held*, that the mortgage was taxable as a part of the capital of complainant and was therefore usurious. 2 Comp. Laws, § 4857. *Union Trust Co.* v. *Radford*, 50.

2. Although the question of intent is to be taken into account in determining whether a contract is usurious, parties must be deemed to have intended the result expressed by clear and unambiguous language employed in the instrument. *Id.* 51.

3. Construing the statute as to usury in the light of 2 Comp. Laws, § 6168, providing that real estate of a trust company shall be taxed as other real estate where it is situated, and the residue of its capital shall be taxed as personal property, in which the word capital is not meant to include all the property of the corporation, such a purchase money mortgage as the one in question must be held to represent an investment of capital, entering into the residue upon which the trust company is liable to pay taxes, and that, therefore, complainant paid the tax on account of such mortgage so as to render the mortgagor liable to repay the amount thereof. Presumptively the mortgage represented an investment of its capital. Property that represents capital stock is the equivalent of capital stock for purposes of taxation. *Id.*

4. In addition to 7 per cent. interest provided for in a mortgage, it was usury to stipulate that the mortgagor should pay the mortgage tax, whether or not the parties actually intended to carry out the arrangement. *Vandervelde* v. *Wilson*, 185.

5. Under the statutes of this State, no remedy in equity is provided for the mortgagor to restrain the foreclosure of the security on the ground of usury, or to obtain relief for usurious provisions in the instrument. 1 Comp. Laws, §§ 4857, 4858 (2 How. Stat. [2d Ed.] §§ 2870, 2871). *Id.*

6. Since statutes forbidding usury are penal in character, they must be strictly construed, and if a complainant is not strictly within the terms of the statute relieving the

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USURY—Continued.

borrower of interest, he must offer or tender in his pleading in chancery to pay the principal and five per cent. interest thereon. *Id.*

7. Unless some attempt has been made by the mortgagee to enforce payment of the mortgage tax as provided for in the contract, no equitable relief can be awarded in a suit to enjoin foreclosure by advertisement. *Id.*

VALUATION FOR PURPOSES OF ASSESSMENT—See FRAUD (7); TAXATION (4).

VALUE—See DAMAGES (4, 5); SPECIFIC PERFORMANCE (2).

VARIANCE—See AMENDMENTS (2); APPEAL AND ERROR (8); PARTNERSHIP (2).

VENDOR AND PURCHASER—See MORTGAGES (1).

VENEREAL DISEASES—See CRIMINAL LAW (17, 21).

VENUE.

1. Change of venue for the convenience of parties or witnesses is discretionary with the trial court, and an order denying the motion may only be reviewed in case of a clear abuse of discretion. *Silverstone* v. *London Assurance Corporation*, 525.

2. Accordingly, it was not reversible error to deny a motion for change of venue from St. Clair to Wayne county, in an action on certain fire insurance policies, upon defendant's showing that its witnesses were in the city of Detroit, that plaintiff resided there, and the expense of bringing the witnesses to the St. Clair circuit would be considerable, where plaintiff filed a showing that defendants had made threats to delay the case, to annoy plaintiff, and that in the Wayne circuit, a year or upward would elapse before the cause could be reached, that many of defendant's witnesses were insurance men who were away from home much of the time and could easily attend a trial in St. Clair county. *Id.*

VERDICT—See APPEAL AND ERROR (9); DAMAGES (5).

VIEW OF PREMISES—See CRIMINAL LAW (11).

VILLAGES—See COSTS; INJUNCTION (2); INTOXICATING LIQUORS (9); MUNICIPAL CORPORATIONS (3-5).

VOLUNTARY PAYMENT—See CONTRACTS (5).

VOLUNTARY SURRENDER OF LIQUOR LICENSE—See INTOXICATING LIQUORS (8, 10, 11).

VOTING MACHINES—See MUNICIPAL CORPORATIONS (1).

WAIVER—See CRIMINAL LAW (11); ELECTIONS (1); GARNISHMENT; MORTGAGES (2); PROCESS (2); RAILROADS (6).

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WAREHOUSEMEN—See CARRIERS (2).

WARNER-CRAMTON ACT—See INJUNCTION (2); INTOXICATING LIQUORS (8).

WARNING AND INSTRUCTING SERVANT—See MASTER AND SERVANT (2, 6).

WARRANTY—See FRAUD (2).

WASTE.

Life tenants may not convey the timber on real estate, as against the rights of remaindermen, granting, at the same time, permission to remove the timber within five years: the transaction amounts to waste, and is invalid. *Stroh* v. *O'Hearn*, 164.

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (9).

WILLS.

1. Under provisions of a will, bequeathing to two of decedent's daughters $500 each, "to be paid from the proceeds of testator's farm as soon as it will admit, or at the pleasure" of testator's widow, but within five years at farthest, the bequests were a charge upon the real estate and proceeds realized therefrom by sale, although the will devised the real property to other beneficiaries. *Stroh* v. *O'Hearn*, 164.

2. Where a neighbor of testatrix who had known her for more than 20 years gave testimony tending to show that decedent frequently used vulgar and profane language, talked in a rambling manner, being nervous and flighty and of failing memory, that she had complained of peculiar sensations in her head and feared she might be going crazy, that she told fortunes with cards, declared she had made many wills and claimed to hold conversations with her deceased husband and others not living, the court should have permitted the witness to give her opinion concerning the sanity of the testatrix. *Paul* v. *Clements*, 251.

3. A devise of a life estate to testator's son, with the use of the income of testator's estate for life, or so long as the son continued to live with his wife, but in case of her death or a legal separation the son to have the fee simple, created a life estate, which terminated with the death of the son who continued to live with his wife, until his decease, and the title in fee simple never vested, for the reason that the condition was not complied with. *Conant* v. *Stone*, 654.

4. Whether the condition was void as against public policy, or valid, the terms of it were not fulfilled and the estate did not pass by the will. *Id.*

5. Where testator made no gift of the fee in case the son continued to live with his wife, the remainder vested in

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WILLS—Continued.

his heirs as a part of decedent's estate, and the son, being sole heir, took the fee: nor was this result prevented by the fact that decedent indicated by his will that he purposed to aid his son but not the wife, and having made no attempt to convey the fee to his grandson or any one else on breach of the condition, title could not be held to have vested in the only grandchild of testator. *Id.*

6. And a clause requiring the executors to convert the estate into income bearing securities within seven years, not having been acted upon, became inoperative after the decease of testator's son within a few weeks following his own death. *Id.*

See EVIDENCE (1-5); SUBROGATION (1).

WITNESSES.

Testimony of defendant, in a foreclosure suit, relating to matters equally within the knowledge of decedent, mortgagee, was incompetent and could not be considered without violating the provisions of 3 Comp. Laws, § 10212 (5 How. Stat. [2d Ed.] § 12856), as amended. *Van Sceiver* v. *King*, 605.

As to contents of a letter from decedent, see EVIDENCE (15).

See CONSTITUTIONAL LAW (2); CONTINUANCE; CRIMINAL LAW (15); EVIDENCE (4, 5); WILLS (2).

WORDS AND PHRASES.

A dwelling house means a building designed as a single dwelling to be used by one family. *Kingston* v. *Busch*, 566.

See CRIMINAL LAW (3, 4); DRAINS; EVIDENCE (14); INTOXICATING LIQUORS (11).

WORK AND LABOR—See CORPORATIONS (2, 3).

WRITTEN CONTRACT—See USURY (4).

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